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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 174

EDWIN K. ATWOOD, ALICE B. ATWOOD and THOMAS HART FISHER,

Appellants,

vs.

WILLACY COUNTY NAVIGATION DISTRICT,

Appellee.

On Appeal from the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, sitting at San Antonio, Texas, and the Supreme Court of Texas.

Jurisdictional Statement

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Appellants,

vs.

WILLACY COUNTY NAVIGATION DISTRICT,

Appellee.

On Appeal from the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, sitting at San Antonio, Texas, and the Supreme Court of Texas.

Jurisdictional Statement

Appellants appeal from the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, sitting at San Antonio, Texas (hereinafter called the "Texas Court of Civil Appeals") and from the judgment of the Supreme Court of Texas (hereinafter called the "Texas Supreme Court") entered on November 24, 1954, and the judgment of the Texas Supreme Court entered on March 9, 1955. Said judgment of the Texas Court

of Civil Appeals entered on May 19, 1954 (R. 355) affirmed the judgment of the trial court previously entered in this action on June 17, 1953 (R. 70-85) condemning certain real property owned by Appellants in Willacy County, Texas. Said judgment of the Texas Supreme Court subsequently entered on November 24, 1954 (R. 497) denied Appellants' application for writ of error from said judgment of the Texas Court of Civil Appeals. Said judgment entered on March 9, 1955 by the Texas Supreme Court (R. 497) denied Appellants' motion for rehearing. The notice of appeal to the United States Supreme Court was filed on April 22, 1955 in the Texas Court of Civil Appeals, being the court possessed of the record (R. 563-570). Appellants submit this jurisdictional statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below.

The opinion of the Texas Court of Civil Appeals is reported in 271 S.W. (2d) 137 and is printed as Appendix A at the foot hereof. No opinion was rendered by the Texas Supreme Court.

Jurisdiction.

In this eminent domain proceeding Appellee, Willacy County Navigation District, a statutory agency of the State of Texas (hereinafter called the "District"), has condemned approximately three square miles (1,760 acres) of Appellants' property (1) for the purpose of using a very small part of that property (no more than 50 acres) for a barge port, concededly a public purpose, (2) for the purpose, appropriately challenged by Appellants as unconstitutional, of itself using the entire balance of said land for "the development of industries"

thereon or of leasing the same to private individuals and corporations, without restriction to any public use by them, but so that the revenues from such leases may be used "both for the maintenance and operation of the business of such districts and for the purpose of making themselves self-supporting and financially solvent and returning the construction costs of their improvement within a reasonable period", and (3) for the purpose of permitting a portion of the lands to be used by the United States Government in response to a supposed request of United States Army Engineers, without any proof that the same is actually necessary for such purpose or even any proof that such request was ever made and with no commitment from the United States for such or any other use.

In short, the Texas courts have held in this case that a Texas agency may expropriate agrarian lands now held by private natural persons, use a very small portion of such lands for the building of a port, and itself develop industries on the remainder of the lands or lease the same to other private individuals for any private use they may choose to make of it, so long as such leases produce revenue to pay for the operating expenses of the District, or for the construction costs of the development of the port, and for the possible use of part of the lands by the United States Government.

No plans or specifications disclosing the intended use of the land have been formulated. No one can tell what the actual eventual use of the land will be.

Moreover, the Texas courts have held in this case, rejecting Appellants' timely and appropriately asserted contentions to the contrary, that Appellee need condemn and pay for only the *"surface"* of Appellants' lands, making no allowance for the value of gaseous fluid or solid mineral deposits, although the preemption of the "surface" of the lands will render the minerals forever inaccessible to Ap-

pellants, the Texas courts holding that these considerations do not reflect a taking of Appellants' property without just compensation and hence without due process of law in violation of the Fourteenth Amendment.

The jurisdiction of this Court to review this case is conferred by Section 1257(2) of the United States Judicial Code (28 U.S.C. 1257(2)).

The following cases, holding that the taking of private property by eminent domain for purposes other than a "public use" is a denial of due process within the inhibition of the Fourteenth Amendment (*Fallbrook Irr. Dist.* v. *Bradley,* 164 U.S. 112; *Madisonville Traction Co.* v. *St. Bernard Min. Co.,* 196 U.S. 239), and this Court's decision in *Missouri Pac. Ry. Co.* v. *Nebraska,* 164 U.S. 403, declaring that "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the 14th Article of Amendment of the Constitution of the United States," are relied upon to sustain this Court's jurisdiction insofar as this appeal challenges the validity of the Texas statute on the ground that it purports to authorize the preemption of private property for uses other than public uses.

This Court's decision in *Kohl* v. *U.S.,* 91 U.S. 367, and the cases of *Trombley* v. *Humphrey,* 23 Mich. 471, and *Darlington* v. *U.S.,* 82 Pa. 382, are relied upon to sustain this Court's jurisdiction so far as the statute is assailed as unconstitutional because as applied in this case, it purports to authorize the State of Texas to take Appellants' lands for use, not by the State of Texas, but by the United States with no showing that the United States has actual need to use the lands so taken for its own use.

This Court's decisions in *U.S.* v. *Welch,* 217 U.S. 333; *Portsmouth Harbor Land & Hotel Co.* v. *U.S.,* 260 U.S. 327; *U.S.* v. *Causby,* 328 U.S. 256; *U.S.* v. *General Motors Corp.,* 323 U.S. 373; *Pumpelly* v. *Green Bay etc. Co.,* 13 Wall. 166; *U.S.* v. *Lynah,* 188 U.S. 445; and *Manigault* v. *Springs,* 199 U.S. 473, are relied upon as sustaining this Court's jurisdiction insofar as the Texas statute is assailed because, as applied in this case, it purports to authorize the expropriation of Appellants' mineral rights by forever depriving them of access thereto without compensation therefor.*

*Appellee conceded in its brief in the Texas Court of Civil Appeals that the condemnation judgment herein appealed from was erroneous because it permanently destroyed Appellants' right of ingress and egress and use of the "surface" for exploitation of the minerals, and agreed to a remittitur on this ground, stating to the Texas Court of Civil Appeals: "This remittitur may be effectuated by remand to the trial court with instructions to reform or amend its judgment in accordance therewith and in such language as this court may deem proper" (R. 370, 373).

THE QUESTIONS PRESENTED.

The questions presented are:

1. May Texas condemn three square miles of privately owned agrarian land for the purpose of using only 50 acres thereof for a port (concededly a public purpose), and for the further purpose of leasing the remainder of the tract (except 1,000 acres involved in question 2 *infra*) to *unspecified private* industries and to other *unspecified private* persons for "development" of the port and "for any and all [*unspecified*] purposes incident to or necessary" for the purposes of the port and "for the purpose of making the Navigation District self-supporting and financially solvent", there being no requirement that the lease of the land to private proprietors be for any specified immediate or direct public purpose?

2. Does the taking of Appellants' lands by a state agency of Texas with the view, but with no showing, that they are necessary for use by United States Army Engineers for Federal purposes and with no commitment by the Federal government for such use deprive Appellants of their property without due process of law?

3. Does the taking of the "surface" of Appellants' lands with payment only for the "surface" confiscate their mineral rights without due process of law, the preemption of the surface rendering it forever impossible for Appellants to exploit their mineral rights?

STATUTES INVOLVED.

The Texas statute known as 1947 Act, Sec. 1, Ch. 125, p. 218, of the Acts of the Regular Session of the 50th Legislature, also appearing as Sec. 50, Art. 8263-h, Vernon's Ann. Civil Stat., under which the condemnation was made is set forth in Appendix B at the foot hereof.

STATEMENT.

Appellants are the owners of the fee simple title to the "surface" of a 1,760 acre tract of land in Willacy County, Texas, as well as the minerals therein (subject to an oil and gas lease) (R. 85). The tract is roughly in the shape of a rectangle, one mile in width and three miles in length, the easterly side of which adjoins and abuts upon that part of the Gulf of Mexico known as the Laguna Madre (R. 352-4). The large size, as well as the shape, of the tract make it a physical impossibility for Appellants as owners of the minerals to gain access thereto, and to extract and enjoy the same, without entering upon and conducting drilling operations from the "surface" thereof; and Appellee so conceded in the Texas Court of Civil Appeals (R. 373).

Willacy County Navigation District, Appellee, is a statutory agency of the State of Texas created for the development and operation of navigable waters or ports for navigation purposes (R. 341-2). The District instituted condemnation proceedings before Commissioners in accordance with Texas l[illegible] to condemn the fee simple title to the "surface" of the 1,760 acre tract, together with "an easement on the mineral rights" therein (R. 9-10), for a shallow barge port to be connected by a channel with the Intra-Coastal Canal, a shallow barge canal constructed by the United States Army Engineers paralleling the shore. A small part (less than 50 acres) of the 1,760 acre tract was sought to be condemned for an admittedly public use, to-wit, for the turning basin or port, together with the necessary wharves, docks, warehouses and other structures directly connected with the navigational use of the port.

The condemnation proceeding was brought to condemn the entire 1,760 acre tract "for and/or in aid of the development of industries thereon" (R. 9, 577), as well as other purposes.

The justification and necessity for condemning the minerals, or rather "an easement on the minerals", was that, as a practical matter, if the "surface" alone were condemned, the mineral owners of a tract one mile wide and three miles long would in actual fact be forever deprived of physical power to gain access to the minerals and to exploit the same without entering and conducting drilling operations upon the "surface" for that purpose (R. 373). Therefore some compensation to the mineral owners was necessary, if the mineral owners were not to be permanently deprived of their minerals as a practical matter, without any compensation, by a condemnation of the "surface" alone.* It presumably was assumed that, by condemning only "an easement on the minerals" (whatever that means, if anything), the condemnation award would be less than if the whole fee simple title to the minerals were condemned.

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*Under Texas law, the owner of minerals in a tract of land may enter upon the "surface" to explore for and exploit the minerals, because such right, if not spelled out in the grant or reservation of the minerals, is nevertheless implied therein. But where the "surface" is condemned for a public use, so that there is no grant or reservation of the minerals from which the right of access can be implied, the mineral owner has no right to enter upon and use the "surface" for exploration and exploitation of the minerals. **Gregg v. Caldwell-Guadalupe Pick-Up Stations**, 286 S.W. 1083; **Calvert v. Harris County**, 46 S.W. (2d) 375, error refused. This was conceded by Appellee in the Texas Court of Civil Appeals, where Appellee admitted that the condemnation judgment was erroneous and should be reformed or amended upon precisely this ground (R. 370, 373).

The District procured a condemnation order from the Commissioners acting under the Texas statute condemning the fee simple title to the "surface" of the entire 1,760 acre tract from the Commissioners (R. 71-5). In addition to the "surface" of the 1,760 acre tract, the order also condemned an "easement on the mineral rights of, in and under" the 1,760 acre tract. The Commissioners awarded the sum of $5,280 for both the "surface" and the "easement on the minerals" (R. 75).

Appellants appealed the condemnation order and award to the County Court of Willacy County, Texas (R. 7-10). Later the case was transferred to the Willacy County District Court, which had succeeded by Texas statute to the jurisdiction over condemnation cases previously exercised by the County Court (R. 349-350). While the case was pending before trial in the Willacy County District Court, the District *voluntarily disclaimed* any interest in the minerals or an easement thereon and *voluntarily dismissed* the mineral lessee under the oil and gas lease as a condemnee therein (R. 7-10, 70-5, 85, 354) (Statement of Facts, p. 2-5).

The trial of the condemnation case took place in the Willacy County District Court. At the trial it appeared from the evidence that, with the exception of the 50 acres immediately surrounding the turning basin and port above referred to, the fee simple title to the entire balance of the "surface" of the 1,760 acre tract was sought to be condemned by the District upon the ground that it was "necessary or required for or in aid of the development of industries on said lands" and for the purpose of permitting the District to lease the same or any part thereof "to any individual or corporation . . . for the purpose of making [the District] self-supporting and financially solvent and returning the construction of [its] improvement within a

reasonable period", to quote from the Texas condemnation statute (see Appendix A) (Statement of Facts, p. 99-100, 435-6, 933-4, 937-8, 1387, 1388-9).

It further appeared from the evidence that the balance of the "surface" of the 1,760 acre tract (exclusive of the 50 acres for the turning basin and port) included 1,000 acres which was also sought to be condemned upon the ground that an *easement* thereon (*not* the fee simple title thereto) was "required" as a spoilage disposal area in the sense that the United States Army Engineers had "requested" the same from the District for that purpose (Statement of Facts, p. 984, 989-991). There was no evidence of any actual need or necessity by the Army Engineers for 1,000 acres for spoilage disposal, the sole evidence being that the Army Engineers had "requested" and "recommended" such acreage as "required" for such use (Statement of Facts, p. 963, 989-991). There is no statutory or contractual commitment that the Federal government will ever use all or any part of this land for spoilage disposal or any other purpose.

It further appeared from the evidence that the condemnation of the fee simple title to the "surface" of the 1,760 acre tract would in actual fact confiscate Appellants' minerals without compensation, because of their permanent inability thereafter as a practical matter to gain access to their minerals in order to exploit the same without entering and conducting drilling operations upon the "surface" for that purpose. (Appellee conceded (in the Texas Court of Civil Appeals) that this was true by tendering a remittitur to reform or amend the judgment to give Appellants a right of access to their minerals (R. 370, 373)).

The judgment of the Willacy County District Court condemned *only* the fee simple title to the "surface" of the 1,760 acre tract owned by Appellants, and awarded them damages including interest of $6,492.62 therefor (R. 85). No award was made for Appellants' interest in the minerals, even though as a practical matter they were thereby deprived forever of access thereto and the power to exploit the same, being without right to enter and conduct drilling operations, and install permanent structures if oil or gas were developed, upon the "surface" as a result of the condemnation thereof (R. 370, 373).

The judgment of the Willacy County District Court condemning the "surface" was appealed by Appellants to the Texas Court of Civil Appeals, which ignored the remittitur tendered by Appellee to reform the judgment so as to grant Appellants access to their minerals and affirmed the trial court (R. 355). Appellants' motion for rehearing was denied (R. 355). Appellants' application for writ of error to the Texas Supreme Court was denied (R. 497). Appellants' motion for rehearing was denied (R. 497). This appeal followed.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED IN THE STATE COURTS.

The unconstitutionality of the Texas Statute and invalidity of the condemnation under it as violative of the Fourteenth Amendment of the Federal Constitution.

(a) The question as to the constitutionality of the Texas statute (see Appendix B) and the invalidity of the condemnation made under it, upon the ground that it purported to authorize the taking or expropriation of private property (owned by Appellants in this case) for other than a public purpose, in that it purported to authorize the condemnation of private property "for or in aid of the development of industries on said lands" and the leasing of the "same or any part thereof to any [private] individual or corporation . . . for the maintenance and operation of the business of such [navigation] districts and for the purpose of making themselves self-supporting and financially solvent and returning the construction costs of their improvement within a reasonable period" (quoted from the Texas condemnation statute), as a deprivation of Appellants' private property without due process of law under the Fourteenth Amendment of the Federal Constitution.

Willacy County District Court. This issue was explicitly raised at the very outset in Appellants' first amended original answer (R. 16-17, 17-20). It was also raised in Appellants' motion for a directed verdict (paragraphs 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 24 and 25) (R. 30-6) made at the close of the evidence and before the case was submitted to the jury. It was also raised in Appellants' motion to strike the evidence of all witnesses as to the alleged public purposes authorized or provided for in the Texas condemnation statute (paragraph 6) (R. 67) made before the case was submitted to the jury. It was also raised in Appellants' exceptions and objections to the charge of the trial judge to the jury (paragraphs 6 to 11, inclusive, 13, 14, 15, 16, 17, 18 and 19) (R. 56-61) made before the case was submitted to the jury. It was also

raised in Appellants' amended motion for a new trial (paragraphs 10, 18, 40, and 72) (R. 88-9, 91, 95, 99) made before the case was submitted to the jury.

This issue was passed upon by the judgment (R. 70-85).

Texas Court of Civil Appeals. This issue was raised in Appellants' brief (R. 188, 190) and argued at length therein (R. 195-225). It was also raised and argued in Appellants' motion for rehearing (R. 360-2, 371-2) and argument for rehearing (R. 393-4).

This issue was passed upon in the opinion (R. 341-8) and judgment (R. 355).

Texas Supreme Court. This issue was raised in Appellants' application for writ of error (R. 405, 407-8) and argued at length therein (R. 413-424). It was also raised and argued in Appellants' motion for rehearing (R. 449-450) and brief in support thereof (R. 470-2, 486-7).

This issue was passed upon in the judgment with the words "and the Court having determined that the application presents no error which requires reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be refused" (R. 497).

(b) The question as to the invalidity of the condemnation of 1,000 acres of "surface" lands (owned by Appellants in this case), upon the ground that an easement thereon (not the fee simple title thereto) was "requested" by the United States Army Engineers, as a deprivation of Appellants' private property without due process of law under the Fourteenth Amendment of the Federal Constitution.

Willacy County District Court. This issue was raised in Appellants' motion for a directed verdict (paragraphs 9, 10 and 28) (R. 31, 37) made at the close of the evidence and before the case was submitted to the jury. It was also raised in Appellants' exceptions and objections to the

charge of the trial judge to the jury (paragraphs 5, 9 and 20) (R. 55-6, 58, 61) made before the case was submitted to the jury. It was also raised in Appellants' amended motion for a new trial (paragraphs 21, 31 and 34) (R. 91-4) made before the case was submitted to the jury.

This issue was passed upon by the judgment (R. 70-85).

Texas Court of Civil Appeals. This issue was raised in Appellants' brief (R. 188-193) and argued therein (R. 269-278, 307-8). It was also raised and argued in Appellants' motion for rehearing (R. 363-4, 367-8, 372) and argument for rehearing (R. 388-388-a).

This issue was passed upon in the opinion (R. 348-9) and judgment (R. 355).

Texas Supreme Court. This issue was raised in Appellants' application for writ of error (R. 408-11) and argued therein (R. 433-5). It was also raised and argued in Appellants' motion for rehearing (R. 453-4) and brief in support thereof (R. 486-492).

This issue was passed upon by the judgment (R. 497).

(c) The question as to the invalidity of the condemnation of Appellants' minerals in 1,760 acres of land, upon the ground that Appellants were permanently deprived of access thereto as a practical matter without compensation therefor, as a deprivation of private property without due process of law under the Fourteenth Amendment of the Federal Constitution.

Willacy County District Court. This issue was raised in Appellants' motion for a directed verdict (paragraphs 5, 25 and 27) (R. 30, 36-7) made at the close of the evidence and before the case was submitted to the jury. It was also raised in Appellants' exceptions and objections to the charge of the trial judge to the jury (paragraphs 3 and 44) (R. 54, 64-5) made before the case was submitted to the jury. It was also raised in Appellants' amended motion

for a new trial (paragraphs 6 and 56) (R. 87-8, 97) made before the case was submitted to the jury.

This issue was passed upon by the judgment (R. 70-85).

Texas Court of Civil Appeals. This issue was raised in Appellants' brief (R. 189, 193) and argued therein (R. 317-324). It was also raised and argued in Appellants' motion for rehearing (R. 369-370, 372) and argument for rehearing (R. 388-a, 389).

Before this issue was passed upon in the Texas Court of Civil Appeals, Appellee conceded that the condemnation judgment was erroneous and should be reformed or amended, and offered a remittitur for this purpose (R. 370, 373).

This issue was passed upon in the opinion (R. 354) and judgment (R. 355).

Texas Supreme Court. This issue was raised in Appellants' application for writ of error (R. 406, 411) and argued therein (R. 425-6). It was also raised and argued in Appellants' motion for rehearing (R. 451-2) and brief in support thereof (R. 480-1).

This issue was passed upon by the judgment (R. 497).

THE QUESTIONS ARE SUBSTANTIAL.

I.

The question whether Texas' preemption of three square miles of privately owned terrain "for and in aid of the development of" unspecified private "industries on said lands" and for "any and all" unspecified "incidental" purposes deprives Appellants of their property without due process of law is substantial.

The Texas statute as construed and applied in this case contemplates that an area of three square miles of now privately owned agrarian lands may be expropriated by a state administrative agency and leased "to any [private] individual or [private] corporation" "for or in aid of the development of [private] industries on said lands" and to "lease same or any part thereof to any individual or corporation and charge therefor reasonable tolls, rents, fees or other charges," the proceeds to be used "for the maintenance and operation of the [private] business of such district and for the purpose of making themselves self-supporting and financially solvent and returning the construction costs of their improvement within a reasonable period."

In short, the Texas statute purports to authorize the commandeering of three square miles of Appellants' property, not only for the development of private industries themselves but "*in aid* of the development of industries on said lands." It is patent that the lands thus to be expropriated may be leased, not only to privately owned industries, but to taverns, theatres, restaurants or any other privately operated institutions that may in the judgment of local administrative officials conduce, however indirectly, to the "development" of a port.

Never before in the annals of this Court has there been a case in which local functionaries claimed the right under a state statute to wrest agrarian lands from their owners with a view to disposing of these lands by leasing them for any number of years for any private industrial, business, residential, recreational or other private use that may in the *future* judgment of such functionaries directly or indirectly conduce in greater or lesser degree to the "development" of a port or other admittedly public purpose.

Stated simply and starkly, the question is whether a state may, even for just compensation, transfer lands from private to public domain for establishing a whole city under the auspices of a revolutionary species of state feudalism, in which lands are enjoyed for any sort of private purpose by a kind of tenure in which the lands are owned by the state and disposed to private individuals at the will of local public officials.

Neither Appellants, the courts of Texas nor this Court have any means of knowing, even vaguely, the actual ultimate destiny of the lands that are thus to be preempted. But let us suppose, although the record affords no basis for this supposition, that every foot of the land will in some way be exploited so as to conduce in some degree to the furtherance in some way of the "development" of the port. Even so, the taking of Appellants' lands for lease for purely private purposes is contrary to every principle that has heretofore been thought to restrain the power of eminent domain.*

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*A statute, ordinance, regulation or other promulgation intended to define substantive rights protected by due process is unconstitutional if it is so vague that the effect cannot be fairly appraised by those who are intended to be bound by it. **Small Co. v. American Sugar Refining Co.**, 267 U.S. 233; **Burstyn v. Wilson**, 343 U.S. 495; **Kunz v. New York**, 340 U.S. 290.

It is fundamental in the law of condemnation that private property cannot be condemned unless it is condemned for a public use. *Fallbrook Irr. Dist.* v. *Bradley*, 164 U.S. 112; *Missouri Pac. Ry. Co.* v. *Nebraska*, 164 U.S. 403; *Madisonville Traction Co.* v. *St. Bernard Min. Co.*, 196 U.S. 239; *Cincinnati* v. *Vester*, 281 U.S. 439. And it is equally fundamental that a public use does not include the right to condemn the private property of one private person merely upon the ground that the condemnor will be able to obtain a financial benefit therefrom by leasing the land for non-public purposes to another private citizen or corporation. As this Court said in *Missouri Pac. Ry. Co.* v. *Nebraska*, 164 U.S. 403, at page 417:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the 14th Article of Amendment of the Constitution of the United States."

The opinion of the Texas Court of Civil Appeals undertakes to justify present preemption of lands for use by private owners incidentally to the "development" of the port by assimilating that taking to the preemption of slums and blighted areas for rehabilitation by new private owners. The vital difference between the principle that justifies slum clearance and the radical principle announced by the Texas Court of Civil Appeals is that *a slum or blighted area is an evil per se.* Slums incubate delinquency, disease and all sorts of human misery. Their abolition is *per se* a public purpose. Indeed, landlords may be compelled to destroy slum tenements at their own expense and with no compensation whatever.

There is no suggestion that the operation of a ranch is an evil that should be abolished, abated or minimized. Generally speaking and throughout the world, the agrarian use of lands, on which food, the staples necessary for

clothing and the timber necessary for shelter, are produced, is essential to life itself.

The question in this case is not whether the power of eminent domain may be used to transform an evil into a blessing but whether a state may constitutionally prefer unspecified industrial or other urban use by one private owner over admittedly agrarian use upon the theory that unspecified urban exploitation represents the higher use of the property than the presently admittedly agricultural use of the lands.

Under the false guise of a condemnation for a pretended public use, but actually for the ultimate private use of some other private individual or corporation, the condemnor in this case has condemned a large area of Appellants' private land adjacent to a shallow barge port for the sole purpose of enabling the condemnor itself to use it for a non-public use or to lease it at a profit for a private use by private individuals or corporations.

If the condemnation permitted in this case by the Texas Court of Civil Appeals and affirmed by the Texas Supreme Court is valid and the state statute here assailed is constitutional, not only Appellee as the condemnor in this case, but also other navigation districts in Texas in other cases could condemn an indefinitely large part of the privately owned land in the State of Texas without the slightest necessity that any part of it would ever be used for a public purpose. For it is obvious that practically any private property in Texas could be used for "industrial development" within the language of this statute; and once condemned ostensibly for this purpose, it could thereafter be leased to any private person or corporation *for any private purpose whatsoever*, so long as the navigation district was attempting thereby to become self-supporting and financially solvent, and to pay off its debts, a requirement which no such district could fail to meet.

Moreover, if this revolutionary doctrine is sound, it need not be restricted to navigation districts, but could be embodied in any other condemnation statute relative to any other state agency, in Texas or in any other state.

A state statute which purports to permit the condemnation of private property for a non-public use or for leasing for a non-public use by private individuals or corporations is unconstitutional as permitting a deprivation of private property without due process of law under the Fourteenth Amendment. See *Washington* v. *Fairchild*, 224 U.S. 510, holding that an order of a state railroad commission requiring competing railroads to build a connection between their lines denies due process where there is no showing of actual public necessity for or substantial interest in such a project. We submit that the Texas statute here involved (Appendix B) is unconstitutional and void for this reason.

It would be hard, we submit, to imagine a more important question than the constitutionality of this Texas condemnation statute. *It goes to the very heart of the entire law of eminent domain.* If this state statute is valid, the right of eminent domain is no longer restricted by the requirement that private property shall be condemned only when necessary for a genuine public purpose as this requirement has been hitherto understood and uniformly enforced throughout the history of the law of condemnation in this country.

The rationale of the present standing opinion of the Texas Court of Civil Appeals embodies a radically new conception of the constitutionally ordained relations between government and the governed. If a state or municipality can build a city, why can it not condemn a city that is already built, regardless of matters of disease,

delinquency or other social evils? Of course nothing is gained by epithetic labels. But for the purpose of demonstrating the substantiality and great moment of the question and not for the purpose of attempting to win our case by nomenclature, we point out that this conception, whether good or bad and whether constitutional or unconstitutional, is so far socialistic in its import as to call for this Court's explicit approbation if it is to be approved.

II.

The question whether Texas denies due process by taking lands with a view to use by the Federal Government and upon a mere request from United States engineers is substantial.

A.

The question whether one sovereign may condemn property for use by another sovereign is substantial.

The decision of the Texas Court in this case directly conflicts with this Court's decision in *Kohl* v. *U.S.*, 91 U.S. 367, in which the court said (p. 373):

> "In *Trombley* v. *Humphrey*, 23 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity, which alone is the foundation of the right."

The decision in the instant case is not only in direct conflict with this Court's decision in the *Kohl* case, *supra*, but is in direct conflict with the decision of the Michigan court in *Trombley* v. *Humphrey*, 23 Mich. 471, which holds that one sovereign may not condemn for the use of another. This conflict of decisions precipitates a substantial conflict that should be resolved by this Court.

B.

Even if the state might condemn private property for Federal, not state, purposes, upon a commitment by the Federal Government that the property would be used for those purposes, the question whether a state may condemn private property with a view to Federal use but with no assurance of and no commitment for such use and with no showing of the necessity for such use is substantial.

Even if *Kohl* v. *U.S.*, 91 U.S. 367, is to be overruled and even if it is to be declared that a state may condemn private property for *actual and reasonably necessary public use by the Federal Government*, this record is barren of any showing either that the lands condemned will actually be used by the Federal Government or that there is any reasonable necessity for such actual use if it ever occurs.

There is no commitment, by legislation or enforceable contract of the Federal Government, that the 1,000 acres condemned for use as a "spoilage disposal area" must or will be used by the Federal Government for that purpose. The only evidence in the record to support this expropriation of 1,000 acres is that United States Army engineers had "requested" the same from the District for that purpose (Statement of Facts, p. 984, 989-91).

This request was not, nor was it based upon, any authorized commitment for such use.

Nor is there any showing other than this "request" that 1,000 acres is "necessary" for any spoilage disposal area.

The question whether one sovereign may preempt private property for the use of another is substantial even when there is definitive commitment for and showing of necessity of such use. *A fortiori*, the question whether such preemption is constitutional when there is neither commitment for the contemplated use nor showing of such necessity is substantial.

III.

The question whether Appellants have been deprived of their mineral rights without just compensation and therefore without due process of law is substantial.

As we have shown in more detail in the Statement of Facts *ante*, although the District originally sought to condemn an "easement" on Appellants' minerals, presumably because such an "easement" could be obtained more cheaply than could the fee in the minerals, the District *voluntarily disclaimed* any interest in or condemnation of the mineral rights or any "easement" therein.

Hence Appellants have been awarded *no compensation whatsoever* for denial of or access to their minerals. As we have shown, it is impossible to exploit the minerals under a tract of three square miles without entering upon and penetrating the surface of the tract.

The importance of this question in the law of eminent domain is shown by the decisions made by this Court upon the subject. In the case of *U.S.* v. *Welch*, 217 U.S. 333, the question was whether the flooding of the surface of private land, so as permanently to cut off a private right of way without compensation, was a lawful exercise of the right of eminent domain. This Court, speaking through Mr. Justice Holmes, answers in the negative, saying (p. 339):

> "But both petition and finding in substance show clearly that the way [a private right of way] has been permanently cut off. A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits that it must pay. But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would an appropriation for the same end. *Miller* v. *Horton*, 152 Mass. 540, 547."

See also *Pumpelly* v. *Green Bay etc. Co.*, 13 Wall. 166; *U.S.* v. *Lynah*, 188 U.S. 445; and *Manigault* v. *Springs*, 199 U.S. 473, to like effect.

Even if every right of the private property owner is not cut off, nevertheless this Court has held that the use of the property cannot be effectively impaired without compelling the condemnor to award compensation for the taking of the property. In the case of *Portsmouth Harbor Land & Hotel Co.* v. *U.S.*, 260 U.S. 327, the Government fired guns over the adjacent property condemned, and this Court, again speaking through Mr. Justice Holmes, held that "the specific facts set forth would warrant a finding that a servitude has been imposed" (p. 330). The same result was reached where airplanes, rather than guns, invaded the air rights of the condemnee. *U.S.* v. *Causby*, 328 U.S. 256.

In the case of *U.S.* v. *General Motors Corp.*, 323 U.S. 373, the Court was considering the same question when it said (p. 378):

> "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." (Citing *U.S.* v. *Welch*, 217 U.S. 333.)

Appellee fully conceded that Appellants had been permanently deprived of their mineral rights in this very case, and offered to reform or amend the judgment in

order to give Appellants a right of access thereto by tendering a remittitur to the Texas court (R. 370, 373), but the state court of appeal nevertheless affirmed the judgment, thus confiscating Appellants' mineral rights in clear violation of the due process clause.

• • • •

This case propounds three important questions.

The question whether a state or municipality can condemn agrarian land for the purpose of building on it a whole city to be used for undefined private industries is substantial.

The question whether a state may condemn land with a view to use by the Federal Government but with no assurance of such use is substantial.

The question whether owners can be foreclosed from access to their mineral rights without compensation under the guise of condemnation for an easement is substantial.

CONCLUSION.

It is respectfully submitted that this Court should entertain this cause.

Respectfully submitted,

EDWIN K. ATWOOD, ALICE B. ATWOOD and THOMAS HART FISHER, *Appellants,*

By William C. Wines

Thomas Hart Fisher,

Norman Crawford,
Attorneys for Appellants.

Appendix follows:

APPENDIX A.

In The
Court of Civil Appeals For The Fourth Supreme Judicial District of Texas, Sitting at San Antonio, Texas.

Edwin K. Atwood, et al. v. *Willacy County Navigation District,* 271 S.W. (2d) 137.

Edwin K. Atwood, Alice B. Atwood and Thomas Hart Fisher have appealed from a judgment of the District Court of Willacy County condemning the fee simple title to the surface (exclusive of minerals and all mineral rights) in and to a tract of land containing 1,760 acres, specifically described by metes and bounds in the judgment.

Condemnation of such land was sought by Willacy County Navigation District for the purpose of constructing a port and attendant facilities to be used in connection with the development and operation of navigable waters of the State. The proposed port, known as Port Mansfield, is to be located on Red Fish Bay in Willacy County.

The appellants submit the appeal upon twenty-three points of error. The record is lengthy, consisting of a 350-page transcript and 1,630 pages of statement of facts. We can not discuss in detail all the contentions raised and arguments advanced in the briefs and keep this opinion within due bounds. Perhaps the most important contention presented is that certain portions of House Bill 451, Acts of the Fiftieth Legislature, Regular Session, 1947, ch. 125, p. 218, Article 8263h, Vernon's Ann. Tex. Stats., are unconstitutional.

Appellee district was organized in accordance with the provisions of Article 16, Sec. 59, of the Vernon's Ann. St. Constitution of the State of Texas and an act of the Legislature adopted in 1925, and as amended in 1945 and 1947, Acts 1925, 39th Leg. p. 7, ch. 5; Acts 1945, 49th Leg. p. 180,

ch. 139; Acts 1947, 50th Leg. p. 218, ch. 125; Article 8263h, Vernon's Ann. Tex. Stats. A further amendment was adopted in 1949, Acts, 51st Leg., p. 1,188, ch. 601, but the provisions thereof are not here material.

On April 5, 1948, the Canal and Navigation Commissioners of the district by proper order found that for the purposes therein set forth it was "necessary and/or required that it acquire fee simple title to the surface and an easement on the mineral rights over, on, in and under" the 1,760-acre tract of land owned by appellants. The stated purposes for which the land was to be acquired were in substantial compliance with the provisions of the 1947 amendment to the statute, Article 8263h, Sec. 50, Vernon's Ann. Tex. Stats.

The 1947 amendment provides that:

> "All navigation districts organized under Article XVI, Section 59, of the Constitution of Texas, whether created by Act of the Legislature or organized under General Law, shall have the right, power and authority to acquire by gift, purchase or condemnation proceedings and to own lands adjacent or accessible to the navigable waters and ports developed by them, that may be necessary or required for any and all purposes incident to or necessary for the development and operation of said navigable waters or ports within said districts or that may be necessary or required for or in aid of the development of industries on said lands, and may lease same or any part thereof to any individual or corporation and charge therefor reasonable tolls, rents, fees or other charges, and use such proceeds both for the maintenance and operation of the business of such districts and for the purpose of making themselves self-supporting and financially solvent and returning the construction costs of their improvement within a reasonable period. The acquisition of said lands for said purposes and the operation and industrial development of such ports and waterways are hereby declared to be a public purpose and a matter of public necessity."

It is appellants' contention that part of the statutory provision above quoted is unconstitutional in that it permits the taking of private property for a use which is not public. It is urged "that the Legislature cannot constitutionally authorize the taking of private property for the development of industry, because such is not a public use, but a private use."

Article 1, Sec. 17, of the Texas constitution, Vernon's Ann. St., prohibits the taking of private property for other than a public use. The constitutional provision states that, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made * * *," and, as pointed out in 2 Nichols, "Eminent Domain" Sec. 7.1(2), "It is now well settled in every state in the union that the prohibition against the taking of property for the public use without just compensation impliedly, but none the less definitely forbids a taking of property for private uses, and it is too late to raise scholastic objections to the established interpretation of this clause of the constitution." There are decisions holding that the taking of property for other than public use likewise violates the due process clauses of the state and federal constitutions. *City of Cincinnati* v. *Vester,* 6 Cir., 33 F. 2d 242, 68 A.L.R. 831, affirmed, 281 U. S. 439, 50 S. Ct. 360, 74 L. ed. 950; 2 Nichols, Eminent Domain, Sec. 7.1(3).

The term "public use" is employed in the constitutional provision and consequently the question of whether or not an Act of the Legislature permits the taking of property for other than a public use necessarily presents a judicial question. *City of Cincinnati* v. *Vester,* 281 U.S. 439, 50 S. Ct. 360, 74 L. ed. 950; *Fallbrook Irr. Dist.* v. *Bradley,* 164 U. S. 112, 159, 17 S. Ct. 56, 41 L. ed. 369, 388; 2 Nichols, Eminent Domain, Sec. 7.4; 18 Am. Jur. 675, Eminent Domain, Sec. 46; 16 Tex. Jur. 577, Eminent Domain, Sec.

15. The declaration of the Legislature upon the subject, however, is entitled to great weight and respect in arriving at a final decision of the question. Not only is the Legislature one of the coordinate branches of government under our constitution, but it is the final arbiter of matters legislative, subject only to the constitution, which is the superior legislative charter. The judicial process comes into action only to vindicate this superior and paramount legislative enactment. We are also mindful of the fact that the Legislative branch through its use of committees and other fact finding methods may perhaps occupy a more favorable position than a judicial body in determining what is necessary to a successful operation of a municipal enterprise such as a port. The emergency declared by the Legislature in passing the 1947 amendment upon a suspension of the rules, was that "this legislation is necessary immediately to permit the districts affected to provide for the industrial development of the lands adjacent or accessible to the navigable waters and ports developed by them." We therefore have a direct Legislative declaration, both in the body of the Act and in the emergency clause, that the taking of lands under the power of eminent domain for industrial development is a taking for "a public purpose and a matter of public necessity."

The appellants strongly urge that the Legislature by the 1947 amendment has attempted to adopt the "recoupment theory" of eminent domain. Particular emphasis is placed upon the statutory provisions allowing the land acquired by condemnation to be leased to private persons or corporations and the proceeds realized thereby used "for the maintenance and operation of the business of such districts and for the purpose of making (the districts) self-supporting and financially solvent and returning the construction costs of their improvements within a reasonable period."

The term "recoupment theory" may be somewhat misleading as the mere fact that a municipal district, through its legitimate operations, may be expected to meet its expenses and even pay for the construction costs of its plant and facilities, does not render its exercise of the power of eminent domain illegal. Under the American authorities, the proper use of the power of eminent domain is exceeded when and only when the municipality condemns land for *a use unconnected with its legitimate purposes*, and simply in order to meet the costs of its proper objectives. A good example of the "recoupment theory" is contained in 2 Nichols, Eminent Domain, Sec. 7.5122(3):

> "It often happens in old and densely populated cities that the narrowness and crookedness of the public ways and the minute subdivision of the adjoining land in the business districts seriously retards the prosperity and growth of the community. To rectify such conditions by a general widening and straightening of the public ways, or by the laying out of broad, new thoroughfares through the heart of the congested district, would be inordinately expensive on account of the heavy damages that would be claimed by the owners of buildings cut in halves and of land left incapable of beneficial use. No lasting benefit to the public would accrue if the minute subdivision of the land left in private ownership continued, so that buildings appropriate to the improved conditions could not be erected thereon.
>
> "In London and some other European cities the difficulty is solved by laying out a broad, straight highway through the section of the city which it is desired to improve, and by taking land on both sides of the new street for a considerable depth. Entire parcels are taken and thus no question of damages to remaining land is left open. After the new street is built the land on either side is cut up into lots of appropriate size and shape and sold to private purchasers, the profit from the transaction often going far toward paying the whole cost of the improvement.

> Such an enterprise, although sanctioned in countries in which the power of the legislature is not restricted by a written constitution, involves the taking of the property of one person and the sale of it to another for his own private use, and, until recently at least, was impossible anywhere within the United States on account of the provisions of the state constitutions."

In our opinion the decision of the Legislature that the acquisition of property under the power of eminent domain by a navigation district "for or in aid of the development of industries upon said lands" does not constitute a commitment to or adoption of the "recoupment theory" of eminent domain. The providing of land for industrial sites is not foreign to the legitimate objectives of the district. As above indicated, if a use be in fact public, it is not rendered otherwise by the expressed hope or desire of the Legislature that the district become self-supporting and not remain a drain or charge upon the general resources of the State. On the other hand, one of the tests of a "public use" is whether or not the purposes for which the land is acquired are reasonably essential to a successful operation of the municipal district.

Upon this point, as said in appellee's brief, the legislative declaration of "public use" is supported by facts well within the realm of common knowledge. The Texas Gulf Coast is one of the rapidly developing industrial sections of the United States. Vast petroleum refining and petrochemical plants are now located within the area, because of the presence of oil and gas in large quantities and the close proximity to sea water, which is an important chemical factor in certain industries. In order to provide economical transportation for the products of industry, as well as those of agriculture, natural harbors have been deepened and improved. The great intracoastal canal has been dredged from the Rio Grande to the Sabine, connecting with a vast system of inland waterways that serve the

Mississippi watershed, and the entire Gulf and East Coast area of the country. The proposed Port Mansfield is to serve as a gathering point and shipping station upon this system. We think it a matter of common knowledge that on the Texas Gulf Coast industrial development and the successful operation of ports located upon either the canal or the gulf go hand in hand. Both are essential, one to the other.

However, reliance need not be placed alone upon matters of common knowledge. In the testimony of F. W. Hofmokel, general manager of the Brownsville Navigation District and director of the Port of Brownsville, we have a picture of the operations of a modern gulf port and its incidental activities. According to Hofmokel, the Port of Brownsville, or the navigation district, owns 15,682.78 acres in fee simple and has a perpetual easement on 3,446.98 additional acres. A total of 6,191.49 acres have now been developed, 321.49 acres are occupied by docks, warehouses, utility lines, etc., 5,870.01 acres are used for purposes of industrial development. The names of the lessees give an idea of the chemical and petroleum development of the region: Carthage Hydrocal, occupying 222.18 acres, with an easement for over five thousand acres for cooling ponds; Gulf Atlantic Warehouse Company; Rio Grande Compress Company; Port Fuel Company; Texas Petroleum Trading Company; Pemex Company (the petroleum company owned and controlled by the Mexican government) and numerous others.

We hold that the acquisition of land for the purpose of leasing the same as industrial sites in the proximity of a port is reasonably necessary to the successful operation of such port. Such use comes well within the definition of "public use" as laid down in the case of *Housing Authority of City of Dallas* v. *Higginbotham*, 135 Tex. 158,

143 S.W. 2d 79, 130 A.L.R. 1053, wherein the matter was exhaustively examined in a well considered opinion written by Mr. Justice Slatton, one of our ablest judges, who had the benefit of elaborate notes upon the subject prepared by the later Chief Justice Cureton. We need not add to what was there said with an abundant citation of applicable authorities.

Our holding of the point is likewise supported by the federal decisions. *People of Puerto Rico* v. *Eastern Sugar Associates,* 1 Cir., 156 F. 2d 316, writ of certiorari denied 329 U.S. 772, 67 S. Ct. 190, 91 L. Ed. 664; *Old Dominion Land Co.* v. *U.S.,* 269 U. S. 55, 46 S. Ct. 39, 70 L. ed. 162. The cited cases are authority for the proposition that the courts should not intervene where the particular undertaking of the Legislature has a real and substantial relation to the public use, and is not an impossibility. Consequently, the implied declaration by the legislative branch of government, that a taking under a right of eminent domain was for the public use, will be given deference by the courts, until it is shown to involve an impossibility. And while (as appellee says) the taking of land by the navigation district at a locality so distant from its public port and waterway that it could have no substantial relationship with the development of the port itself, would be an impossibility, the statute does not permit such taking, but on the contrary provides that the land must be "adjacent or accessible to the navigable waters and ports developed by them."

We hold that the acquisition of lands for industrial development by a navigation district is for a public use, and that the amendment of 1947, Article 8263h, Sec. 50, Vernon's Ann. Tex. Stats., is constitutional.

Considering the grant of authority contained in the statute, as well as the underlying constitutional basis for the creation of the district, Article 16, Sec. 59, we are likewise of the opinion that it appears as a matter of law that the Board of Navigation and Canal Commissioners did not abuse the discretion vested in it by law, either in deciding that a total of 1,760 acres was necessary to meet the needs of the district or that a fee title rather than a perpetual easement should be condemned. Issues upon both of appellants' contentions, *i.e.*, the extent of the tract and the nature of the title to be secured, were submitted to the jury and answered favorably to appellee. As we view the record, however, no jury question was involved. The law invests the board with the power and authority to decide, but does not constitute a jury as a reviewing body of the board's decision. The question of an abuse of discretion on the part of a quasi-legislative body or an administrative board is one of law for the court. In arriving at a final decision there may be issues of fact involved, but the ultimate inference or conclusion to be drawn is one for the court. *Mean* v. *Nueces County Navigation Dist. No. 1*, Tex. Civ. App., 222 S. W. 2d 402, wr. ref. Here there is no substantial dispute as to facts bearing upon the issue of abuse of discretion. The record shows that the Board proceeded after due deliberation and investigation. It had received a request from the United States government, acting through Army Engineers, that 1,000 acres be provided for a spoilage area, and had also received and acted upon a report of a firm of consulting engineers recommending that a total of 1,760 acres be acquired for spoilage areas, port facilities and industrial development. It cannot be said that the action of the board was arbitrary and without governing principle. *Housing Authority of the City of Dallas* v. *Higginbotham*, 135 Tex. 158, 143 S. W. 2d 79, 130 A.L.R. 1053; *Manga* v. *Texas Trans-*

portation Company, Tex. Civ. App., 18 Tex. Civ. App. 478, 44 S.W. 998; *National Association of Audubon Societies* v. *Arroyo Colorado Navigation Dist.,* Tex. Civ. App., 110 S.W. 2d 150; *Brazos River Conservation & Reclamation Dist.* v. *Harmon,* Tex. Civ. App., 178 S.W. 2d 281; *Meaney* v. *Nueces County Nav. Dist. No. 1,* Tex. Civ. App., 222 S.W. 2d 402.

Before considering those points in appellants' brief which relate to alleged errors largely of a procedural nature, we will consider the assertion that the 107th District Court was without jurisdiction of these proceedings, but that such jurisdiction was vested in the County Court of Willacy County.

By an Act of the Forty-ninth Legislature, 1945, p. 472, Article 199 (107), Vernon's Ann. Tex. Stats., the Criminal District Court of Nueces, Kleberg, Kenedy, Willacy and Cameron Counties, was re-constituted as a court of general jurisdiction with the power and authority of a constitutional district court. Its territorial jurisdiction was limited to Cameron and Willacy Counties, and it was designated as the 107th District Court. By Acts 1949, 51st Legislature, Regular Session, p. 678, ch. 351, Article 199 (107) Vernon's Ann. Tex. Stats., was amended by adding a new section thereto, designated as 5a, which conferred certain jurisdiction formerly possessed by the County Court of Willacy County, upon the 107th District Court. At a subsequently called session of the Fifty-first Legislature, said subdivision 107 of Article 199, as amended by the Acts of the Regular Session, 51st Legislature, p. 678, ch. 351, was further amended so that section 5a of subdivision 107 of Article 199, now reads in part as follows:

> "Section 5a. In addition to the jurisdiction vested in the 107th District Court under the Constitutional and General Laws of the State, said Court shall have and exercise jurisdiction over all civil matters over

> which, by General Law, the County Court of Willacy County would have original jurisdiction except as in this Act otherwise specially provided, *and shall have and exercise jurisdiction over all appeals in condemnation proceedings.* * * *" Acts 1949, 51st Leg., First Called Session, p. 96, ch. 33.

The words above italicized, "and shall have and exercise jurisdiction over all appeals in condemnation proceedings," were added by the amendment adopted at the called session.

Appellants contend that the proceedings held in a county court, whenever one party is dissatisfied with the decision of special commissioners, are not appellate in nature, inasmuch as Article 3266, Sec. 6, Vernon's Ann. Tex. Stats., provides that such "cause shall be tried and determined as in other civil causes in the county court." As explanatory of such proceedings, appellants cite *Johnston* v. *Galveston County,* Tex. Civ. App., 85 S. W. 511.

In a sense, however, the proceedings taking place in the county court, after a dissatisfied party has invoked its jurisdiction in accordance with the provisions of Article 3266, may be considered as appellate, although the award of the special commissioners is not directly reviewed but the case is tried *de novo.* Suits in district courts, or other judicial tribunals seeking to set aside an order or award of an administrative body are commonly referred to as "appeals," particularly when expressly provided for by statute. It was in a similar sense that the Legislature employed the words, "all appeals in condemnation proceedings." We hold that the Legislature intent, as determined by the language employed in the Act here involved, was to transfer the jurisdiction to determine causes under Article 3266, Sec. 6, from the County Court of Willacy County to the 107th District Court. The court below had jurisdiction of this case.

We are of the opinion that no reversible error is disclosed by the trial judge's action in overruling the motion for change of venue. It was contended that as certain of appellants were descendants of Richard and Henrietta M. King and the property involved was originally part of the King Ranch, appellants because of local prejudice could not obtain a fair trial in Willacy County. We regard the evidence on the point as being conflicting. Although a number of special issues were submitted to the jury, it appears that most of them were unnecessary, as in the main this is a cause for legal determination. As to the damage issue, which was for the jury, the award was for $6,213.00, and there is no indication in the evidence that the sum was inadequate.

Article 8263h, Sec. 34, Vernon's Ann. Tex. Stats., provides that condemnation proceedings on behalf of a navigation district "shall be instituted under the direction of the Navigation and Canal Commissioners, and in the name of the navigation district, and the assessing of damages shall be in conformity with the statutes of the State of Texas for condemning and acquiring the right of way by railroads; * * *." Article 6336 provides that when a railroad corporation and the owner of property sought to be acquired for right of way are unable to agree upon terms for the purchase of the property, the railroad corporation "may acquire such property by condemnation thereof."

This provision of the statute serves a useful purpose in preventing needless appeals to the courts when the matter may have been settled by negotiations between the parties. Appellant here contends that there is no showing of an effort on the part of the officials of the navigation district to agree with the owners of the land upon a price to be paid for the property desired, and that such showing is

essential to the maintenance of a condemnation suit. *Isaac* v. *City of Houston,* Tex. Civ. App., 60 S. W. 2d 543; *Malone* v. *City of Madisonville,* Tex. Civ. App., 24 S. W. 2d 483; 16 Tex. Jur. 741, Eminent Domain, Sec. 125. This requirement must be given a reasonable interpretation in keeping with the purpose sought to be accomplished. It appears that negotiations were had between Charles Johnson, the appellee's port director, and Thomas Hart Fisher, who was not only a part owner of the land involved, but also an attorney at law representing the other owners, Edwin K. Atwood and Alice B. Atwood. While Fisher possessed no authority to bind his co-owners to convey land, he was authorized to negotiate and submit propositions of purchase to them. Negotiations were had with Fisher with reference to the acquisition of an easement by perpetual lease, but no agreement was reached. On April 5, 1948, the directors of the district turned down a tentative proposal by Fisher; notified him by telegram of this action two days later and submitted a proposal to pay $2 per acre for the fee simple title to the lands desired. This counter proposition was not accepted with the result that condemnation proceedings were instituted on April 14, 1948. This being the state of the record, we hold that there was no evidence supporting the conclusion that the officials of the district had not attempted to arrive at an agreement with the land owners relating to terms of purchase before condemnation proceedings were instituted.

It is also asserted by appellants that the condemnation proceedings must fall because the tract of land involved is not described with sufficient certainty that it can be located upon the ground. The description of the property is as follows:

> "Being out of and a part of the San Juan de Carricitos Grant in Willacy County, Texas, described by metes and bounds as follows:
>
> "STARTING with the U. S. Coastal and Geoditic Survey, permanent bench SAUZ, which is located as lati-

tude 26 degrees, 32 minutes, 16.012 seconds and longitude 97 degrees, 25 minutes, 13.527 seconds;

"THENCE, at an azimuth 202 degrees, 32 minutes, for a distance of 351.4 feet, to the south-east corner of the proposed tract;

"THENCE, west (azimuth 270 degrees, 0 minutes), for a distance 7,940 feet to the south-west corner of said tract;

"THENCE north (azimuth 0 degrees, 0 minutes) for a distance 11,880 feet to the north-west corner of said tract;

"THENCE east (azimuth 90 degrees, 0 minutes), for a distance of 5,280 feet to the north-east corner of said tract; this corner being a point on the shore line of Red Fish Bay;

"THENCE generally southward, following the ordinary high tide line of Red Fish Bay, to beforementioned starting point of the tract, same being the south-east corner of the tract;

"Containing 1760 acres of land, more or less."

Colonel Frank H. Newman, Jr., a civil engineer and member of the firm of Lockwood and Andrews, consulting engineers of Houston, Texas, testified that a competent surveyor would have no difficulty in locating the above described tract upon the ground. We think his testimony was obviously correct. The purpose of the notes was to describe a tract of land bounded on the east by the shoreline. The southeast corner therefore lies in the shoreline where it is intersected by the south boundary line of the tract. This is true despite the fact that a point from "SAUZ" at an azimuth 202 degrees, 32 minutes and a distance of 351.4 feet may not locate a point exactly upon the shoreline. The azimuth (the angle from true north made by turning to the right or clockwise therefrom) and distance calls from "SAUZ" describe a definite fixed point upon the surface of the earth. The south-west corner of the tract is due west (azimuth 270 degrees) a distance of 7940 feet therefrom. The northwest corner is due north

(azimuth 0 degrees) a distance of 11,880 feet from the south-west corner. These two corners are definite fixed inland points. The north and south boundary lines of the tract are likewise definitely fixed by such points and the azimuth calls therefrom. The northeast and southeast coners of the tract are located where these lines intersect the shore line. While changes in the shore line, due to wind and sea erosion may occur, it is only the shore line boundary of the tract which would shift as a result thereof. In determining the boundaries of a tract of land it is important to ascertain where upon the ground the surveyor intended it to be located. 7 Tex. Jur. 121, Boundaries, Sec. 4. In the present case this may best be done by locating the inland unchanging corners from the benchmark, "SAUZ", a designated point on the earth's surface, accurately described by latitude and longitude by three place decimals, and constructing the survey therefrom.

It is also said that the description is rendered indefinite because the shore line, which is generally the eastern boundary line, in some points crosses the south boundary. In other words, an indentation of the bay runs westerly into the land and then turns south and crosses the south boundary line of the tract. Colonel Newman followed the south boundary line as set forth in the field notes, rather than the shore line, in reconstructing the south boundary line. In this he was simply following the field notes in accordance with a correct procedure.

It is further suggested that there is error in the judgment for the reason that the interest in the land condemned was described in the judgment as, "the fee simple title to the surface (exclusive of minerals and all mineral rights)," while in certain preliminary proceedings, such as the application for condemnation and the award of the special commissioners, the estate sought to be condemned is described

as "the fee simple title to the surface and an easement on the mineral rights." This variance, if it can be so called, in no way operated to the prejudice of appellants, as the estate finally condemned and described in the judgment of the district court was obviously the lesser estate.

We have examined and considered all of appellants' points of error. In our opinion, none of them discloses a reversible error and the judgment appealed from is accordingly affirmed.

APPENDIX B.

1947 Act, Sec. 1, Ch. 125, p. 218, of the Acts of the Regular Session of the 50th Legislature of Texas, Also Appearing as Sec. 50, Art. 8263-h, Vernon's Ann. Civil Stat.

"All navigation districts organized under Article XVI, Section 59, of the Constitution of Texas, whether created by Act of the Legislature or organized under General Law, shall have the right, power and authority to acquire by gift, purchase or condemnation proceedings and to own lands adjacent or accessible to the navigable waters and ports developed by them, that may be necessary or required for any and all purposes incident to or necessary for the development and operation of said navigable waters or ports within said districts or that may be necessary or required for or in aid of the development of industries on said lands, and may lease same or any part thereof to any individual or corporation and charge therefor reasonable tolls, rents, fees or other charges, and use such proceeds both for the maintenance and operation of the business of such districts and for the purpose of making themselves self-supporting and financially solvent and returning the construction costs of their improvement within a reasonable period. The acquisition of said lands for said purposes and the operation and industrial development of such ports and waterways are hereby declared to be a public purpose and a matter of public necessity."

APPENDIX C.

FINAL JUDGMENT.
No. 1692

Willacy County Navigation District
vs.
Edwin K. Atwood, et al

In the District Court of Willacy County, Texas
107th Judicial District

This the 25th day of May, 1953, in the above matter, came on to be considered the decision of the Special Commissioners therein filed with the County Judge of Willacy County, Texas, on the 21st day of June, 1948, and it appearing to the Court that in pursuance of a certain statement filed with the Judge of the County Court of Willacy County, Texas, by Willacy County Navigation District, Petitioner, on the 14th day of April, 1948, wherein, upon the facts alleged, it prayed for condemnation of the fee simple title to the surface and an easement on the mineral rights of the lands hereinafter described which prayer was thereafter changed by amendment to seek condemnation of the fee simple title to the surface (exclusive of minerals and all mineral rights) of the lands hereinafter described, and that, upon consideration of such statement, and forthwith upon its filing, to-wit; on the 14th day of April 1948, the said Judge appointed Nat Wetzel, E. F. Starck and Dale Watson, three disinterested freeholders of Willacy County, as special Commissioners to assess the damages, that such Commissioners met, took the oath required by law, appointed a date and time for hearing such parties,

gave and caused to be served notice thereof as required by law upon some of the parties defendant, at the appointed date and time met and appointed another date and time for hearing such parties, gave and caused to be served notice thereof as required by law upon the remaining parties defendant, and, after due hearing, made their decision of the following warding, all of the matters, recitations and findings in which decision are in this judgment found to be true and correct, to-wit:

"NUMBER 7
IN CONDEMNATION

Willacy County Navigation District
vs
Edwin K. Atwood, et al

Proceedings Had Before Special Commissioners.

Whereas, on the 14th day of April, A.D. 1948, Willacy County Navigation District, a governmental agency and body politic and corporate, under the Constitution and laws of the State of Texas, hereinafter described as Petitioner, filed a certain statement in writing with the County Judge of Willacy County, County, Texas, wherein, upon the facts alleged, it sought condemnation of the fee simple title to the surface and an easement on the mineral rights of, in and under certain lands in said County belonging to one or more of the Defendants, and in which each of said defendants claims some right, title or interest, which lands are hereinafter described; and,

Whereas, upon consideration of such statement, and forthwith upon its filing, to-wit: on the 14th day of April

A.D. 1948, the said Judge appointed the undersigned three disinterested freeholders of such County as Special Commissioners, to assess the damages occasioned by the condemnation of such lands;

Therefore, we, the undersigned Commissioners so appointed, duly qualified as such on the 14th day of April, 1948, each taking the oath as prescribed by law. And on the 14th day of april, 1948, by an order duly issued and signed by each of us, we appointed the 26th day of April, 1948, at ten o'clock A.M., in the District Court room at the Court House in Raymondville, Willacy County, Texas, as the day and place for hearing the parties, such date being the earliest practicable and such place being at the County Seat of the County in which said parperty in controversy is situated, of which time and place of hearing we issued a notice in writing to Willacy County Navigation District, Petitioner; and to Edwin K. Atwood, a single man; Alice B. Atwood, a feme sole; B. D. Tarleton, Guardian of the Estate of Richard W. Atwood, a person of unsound mind; Richard King, Individually, as Independent Executor of the Estate of Henrietta M. King, Deceased, and as Trustee under the will of Henrietta M. King, deceased; John D. Finnegan, as Trustee under the will of Henrietta M. king, Deceased; Richard M. Kleberg, Individually, as Trustee under the Will of Henrietta M. King, Deceased, as Surviving Executor of the Estate of Robert J. Kleberg, Sr., Deceased, and as Executor of the Estate of Alice G. K. Kleberg, Deceased; Robert J. Kleberg, Jr., Individually, as Trustee under the Will of Henrietta M. King, Deceased, as Surviving Executor of the Estate of Rovert J. Kleberg, Sr., Deceased, and as Executor of the Estate of Alice G. K. Kleberg, Deceased; Elizabeth A. Baldwin and husband, James P. Baldwin; Mary K. Estill and husband, Gentry Estill; Minerva K. Patch and hus-

band, J. Dorst Patch; King Ranch, a Texas Corporation, Thomas Hart Fisher, Individually and as a member of the law partnership of Fisher, Boyden, Bell, Boyd and Marshall; Alejandro G. TRevino Post No. 390, Incorporated; and Humble Oil & Refining Company, a corporation, being all of the Defendants named in the statement of said Petitioner; and,

Whereas, pursuant to said order and notice we met and convened as such Special Commissioners on April 26, 1948, at ten o'clock A.M. in the District Court room of the Court House in Raymondville, Willacy County, Texas, for the purpose of assessing the damages to be occasioned by said condemnation; whereupon, it appearing that all other parties to said proceedings appeared herein by and through their attorneys except Edwin K. Atwood; Fisher, Boyden, Bell, Boyd and Marshall, a law partnership; Thomas Hart Fisher, Individually; and Mary K. Estill, upon whom service of notice had not been effected as provided by law; and we, the said Special Commissioners, at said time and place made an order adjourning said hearing over and resetting the same for the same hour and place on the 14th day of June, 1948, and issued notice of said adjourned hearing directed to the above named defendants, who had not been served with notice in the manner provided by law.

And on the 14th day of June, 1948, at ten o'clock A.M. in the District Court room at the Court House in Raymondville, Willacy County, Texas, upon the day and at the place so appointed for continuing such hearing, we, the said Special Commissioners, again met and convened for the purpose of assessing said damages, and service of notice having been prefected, and the said Petitioners, Willacy County Navigation District, appearing by and through

its duly authorized attorneys, Lyle V. Timmins and Bow
& Scanlan, and the Defendants Richard King, Individuall
as Independent Executor of .he Estate of Henrietta M
king, Deceased, and as Trustee under the Will of Henriett
M. King, Deceased; John D. Finnegan, as Trustee und
the Will of Henrietta M. King, Deceased; Richard M. Kl
berg, Individually, as Trustee under the Will of Henriett
M. King, Deceased, as Executor of the Estate of Richard
Kleberg, Sr., Deceased, and as Executor of the Estate
Alice G. K. Kleberg, Deceased; Robert J. Kleberg, Jr
Individually, as Trustee under the Will of Henrietta M
King, Deceased, as Executor of the Estate of Robert
Kleberg, Sr., Deceased, and as Executor of the Estate
Alice G. K. Kleberg, Deceased; Gentry Estill; Minerv
K. Patch and her husband J. Dorst Patch; King Ranch
Elise A. Baldwin and her husband, James P. Baldwin, a
pearing by and through their duly authorized attorney
Denman, Franklin & Denman; and the Defendants Aleja
dro G. Trevino Post No. 390, Incorporated, American L
gion, Department of Texas, And B. D. Tarleton, Guardia
of the Estate of Richard W. Atwood, a person of unsou
mind, appearing by and through their duly authorized atto
ney, S. L. Gill; and the Defendant Humble Oil & Refini
Company, having waived the issuance and service of noti
upon it, appearing by and through its authorized atto
neys, Robinson & Strawn; and the Defendants Alice
Atwood, Edwin K. Atwood and Thomas Hart Fisher, a
pearing by and through their duly authorized attorney
Taylor, Cox, Wagner & Adams; and the defendant Fishe
Boyden, Bell, Boyd and Marshall, a law firm, appearin
in person by and through a member of said firm, to-wi
Thomas Hart Fisher; but the Defendant Mary K. Esti
although duly served with citation by publication in th
manner and for the time as provided in law, appeared no

but wholly made default, we, the undersigned Special Commissioners, by appropriate order in writing, duly appointed Leroy G. Denman, Jr., a practicing attorney of the State of Texas, to represent and defend the estates of the said Mary K. Estill in this behalf; and we preceeded fully to hear evidence as to the value of the property sought to be condemned, to-wit:

Being out of and a part of the San Juan de Carricitos Grant in Willacy County, Texas, described by meates and bounds as follows:

STARTING with the U.S. Coastal and Geodetic Survey, permanent bench Sauz, which is located as latitude 26 degrees, 32 minutes, 16.012 seconds and longitude 97 degrees, 25 minutes, 13.527 seconds;

THENCE, at an azimuth 202 degrees, 32 minutes, for a distance of 351.4 feet, to the south-east corner of the proposed tract;

THENCE, west (azimuth 270 degrees, 0 minutes) for a distance 7,940 feet to the south-west corner of said tract;

THENCE north (azimuth 0 degrees, 0 minutes) for a distance 11,880 feet to the north-west corner of said tract;

THENCE east (azimuth 90 degrees, 0 minutes), for a distance of 5,280 feet to the north-east corner of said tract; This corner being a part on the shore line of Red Fish Bay;

THENCE generally southward, following the ordinary high tide line of Red Fish Bay, to beforemention Starting point of the tract, same being the south-east corner of the tract;
containing 1760 acres or land, more or less;

And as to the damages which will be sustained by the owners by reason of such condemnation, and as to the bene-

fits that will result to the remainder of property belonging to such owners by reason of the condemnation of said property, and its employment for the purposes for which it is to be condemned, all as required by law, excluding from consideration and from our estimate those injuries or benefits which said owners sustain or receive in common with the community generally, and which are not peculiar to them and connected with their ownership, use and enjoyment of the particular parcel of land;

And thus, having estimated that there is not injury to the remainder of such property, and that it is not diminished in value by reason of such condemnation, we do accordingly assess the actual damage which will accrue to such owners and/or claimats, being all of the defendants hereinabove named, by such condemnation at Five Thousand Two Hundred Eighty ($5,280.00) Dollars for the fee simple title to the surface and an easement on the mineral rights of, in and under the above described lands; and we do now on this the 14th day of June, 1948, reduce this, our decision, to writing and do hereby state, decide and order that the actual amount of damages due all of the said defendants hereinabove named, being the owners and/or claimants of said condemned property, is $5,280.00, to be paid by the said Willacy County Navigation District, Petitioner; and we do further decide and adjudge that, because we, the Special Commissioners, have awarded an amount as damages greater than that amount the Petitioner offered to pay before these proceedings commenced, the said Willacy County Navigation District should pay all the costs of these proceedings, amounting to $159.48. A statement in writing of all of the costs that have accrued certified to by us as required by law, is hereto attached and made a part thereof.

IN TESTIMONY WHEREOF, WE HAVE signed this decision and dated it this 14th day of June, 1948.

/s/ Nat Wetzel
/s/ E. F. Starck
/s/ Dale Watson
Special Commissioners.

NUMBER 7

IN CONDEMNATION

Willacy County Navigation District
vs.
Edwin K. Atwood, et al

Proceedings Had Before
Special Commissioners.

COSTS ACCURED IN SAID PROCEEDINGS AND TAXED AGAINST WILLACY COUNTY NAVIGATION DISTRICT

3 Special Commissioners (Nat Wetzel, Dale Watson, E. F. Starck), 5 days each at $3.00 per day each $45.00

Witnesses;

S. I. Jackson	$1.00
W. H. Post	1.00
M. W. Bausell	1.00
John Holder	1.00

W. C. Witt	1.00 plus 24 miles at 6c per mile	$2.44
C. T. Lemons	1.00 plus 24 miles at 6c per mile	$2.44
S. L. Shelton	1.00	
Cleo Gilliland	1.00	10.88
R. M. Cisneros for serving Alejandro C. Trevino Post 390, Incorporated		4.00
Chas. F. McEvoy, Deputy sheriff of Cook County, Illinois, for serving Alice B. Atwood		4.40
Ross Stephenson, Deputy Sheriff of Nueces County Texas, for serving Richard King		—
Ross Stephenson, Deputy Sheriff of Nueces County, Texas, for serving B. D. Tarlton, Guardian of the Estate of Richard W. Atwood, a person of unsound mind		—
Chas. Bradshaw, Deputy Sheriff of Nueces County, Texas, for serving Elizabeth A. Baldwin		—
Chas. Bradshaw, Deputy Sheriff of Nueces County, Texas, for serving James P. Baldwin		5.40
R. C. Stevenson, Deputy Sheriff of Kleberg County, Texas, for serving John D. Finnegan,		—
R. C. Stevenson, Deputy Sheriff of Kleberg County, Texas, for serving King Ranch by serving Al Kleberg, its agent		2.90
C. F. Reed, Deputy Sheriff of Loundun County, Virginia for serving J. Dorst Patch		—
C. F. Reed, Deputy Sheriff of Loundun County, Virginia for serving Minerva K. Patch		2.50
K. W. Ashcraft, Sheriff of Howard County, Missouri, for serving Gentry Estill		4.00
William E. Roddatz of Cook County, Illinois, for serving thomas Hart Fisher		$25.00
Willacy County News, for citation by publication		48.90

L. D. Snow, Sheriff of Willacy County, for serving notice by publication	1.25
L. D. Snow, Sheriff of Willacy County for subpoenaing he above witnesses	5.25
Total	$159.48

We, the undersigned Special Commissioners in the above entitled and numbered condemnation proceeding, do hereby certify that the foregoing is a full and true statement of the above styled proceedings.

DATED this 14th day of June, 1948.

/s/ Nat Wetzel
/s/ E. F. Starck
/s/ Dale Watson"

which decision, together with all other papers connected with the proceedings were by said Commissioners filed with said Judge on the 21st day of June, 1948;

And objections having been filed to such decision of said Commissioners within the time prescribed by law with said Judge by all parties defendant, and the adverse party, Willacy County Navigation District, having appeared, thereafter, the Defendant Alejandro C. Trevino Post 390, incorporated, American Legion, a Texas corporation, dismissed its objections to such decision, and the defendant, Humble Oil and Refining Company, a private corporation, was dismissed from this cause and the defendants B. D. Tarlton, Guardian of the Estate of Richard W. Atwood, a person of unsound mind; Richard King, Individually, as Independent Executor of the Estate of Henrietta M. King, deceased, and as Trustee under the Will of Henrietta M. King, deceased; John D. Finnegan, as Trustee under the Will of Henrietta K. King, deceased; Richard M. Kleberg, Individually, as Trustee under the Will of Henrietta M.

King, deceased, as Surviving Executor of the Estate of Robert J. Kleberg, Sr., deceased, and as Executor of the Estate of Alice G. K. Kleberg, deceased; Robert J. Kleberg, Jr., Individually as Trustee under the Will of Henrietta M. King, deceased, as Surviving Executor of the Estate of Robert J. Kleberg, Sr., deceased, and as Executor of the Estate of Alice G. K. Kleberg, deceased; Elizabeth A. Baldwin and husband, James P. Baldwin; Mary K. Estill and husband Gentry Estill; Minerva K. Patch and husband J. Dorst Patch; King Ranch, a Texas corporation; Fisher, Boyden, Bell, Boyd and Marshall, a law firm, although having appeared either in person or by attorney and filed objections to such decision, came not further herein, and came the Plaintiff, Willacy County Navigation District, by its Attorneys Robinson & Strawn, Nielsen and McCormick and Bowie and Scanlan, and came the Defendants, Edwin K. Atwood, Alice B. Atwood and Thomas Hart Fisher, by their Attorneys S. L. Gill and Cox, Wagner, Adams, and Wilson, and announced ready for trial, and thereupon came a jury of good and lawful men, who being duly impaneled and sworn, and having heard the pleadings, the evidence and the argument of counsel upon their oaths did say this the 5th day of June, 1953; this cause having continued on trial until such date, to wit:

"Willacy County Navigation District
vs.
Edwin K. Atwood, et al

In The 107th District Court of Willacy County,
Texas No. 1692

Gentlemen of the Jury:

This case is submitted to you on special issues—that is, you are called on to answer some questions as to particular

facts in the case, from the evidence you have heard in the trial. You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, but in matters of law, you must be governed by the instructions of this charge. In discharging your responsibility on this jury, please remember that there are standards of conduct to be lived up to, and rules to be obeyed, and that if you do not comply with them, our efforts will be wasted.

1. Do not let bias, prejudice, sympathy, resentment, or any such emotion play any part in your deliberations.

2. Do not discuss the case, or even mention it to anyone whatsoever, nor permit it to be mentioned in your hearing, except in the jury room when all jurors are present for the purpose of deliberating on the verdict. If anyone attempts to mention the case otherwise, you must report it to the Court at once.

3. Hold yourselves apart from the lawyers, the witnesses, and the parties to the suit. They are compelled to hold themselves apart from you, and they understand your aloofness.

4. Do not speculate on matters not shown by the evidence, and about which you are not asked any questions. Remember that you cannot guess your way to a just and correct verdict.

5. Be very careful not to consider or mention any personal knowledge or information you may have about any fact or person, which is not shown by the evidence you have heard in this trial. Do not try to gather any evidence for yourselves. Your duty to answer these questions from the evidence that has been admitted in open court under the rulings of the Court, and from that alone.

6. Do not try to reach a verdict by lot, or chance, and do not return a quotient verdict, by adding together figures, dividing by the number of jurors, and agreeing to be bound

by the result. Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way.

7. Do not decide who you think should win, and then try to answer the questions accordingly. If you do that, your verdict will be worthless, and all of our time will have been wasted. Simply answer the questions as you find the facts from the evidence, without concerning yourselves about the effect of your answers.

Keep these rules in mind at all times, and obey them strictly until you have reached your verdict. The verdict will consist of your answers, arrived at by unanimous consent of the jurors, to the questions, written in the blanks provided, with the certificate signed by your foreman on the last page of this charge.

I.

By the term "preponderance of the evidence", as used in this charge, is meant the greater weight of the credible testimony, and other evidence offered and admitted under the rulings of the Court.

II.

You are instructed that the term "fee to the entire surface estate" (exclusive of minerals and all mineral rights) as used in this charge is the largest estate in the surface of the land known to the law and necessarily implies absolute dominion over the land to the exclusion of all other persons save and except the right of those persons owning the minerals or mineral rights under the land to explore for and develop the same.

III.

You are instructed that an "easement" is a right which one person has to use the land of another for specific purposes. An easement owner is entitled to the free and un-

disturbed use of the property on which it has said easement for all purposes for which said easement is acquired. The fee owner of land upon which there is an easement can also make use of such land so long as he does not interfere with the lawful and proper enjoyment of the land by the said easement owner.

IV.

You are instructed that the term "clear abuse of discretion" as used in this charge, implies not merely an error of judgment on the part of the Board of Navigation and Canal Commissioners, but implies perversity of will, passion, prejudice, partiality, or moral delinquency.

V.

A. In connection with Special Issues numbered 1 and 2, you are further instructed that the plaintiff has the right, power and authority to acquire by condemnation proceedings and to own lands adjacent or accessible to navigable waters and ports developed by it that may be necessary or required for any and all purposes incident to or necessary for the development and operation of said navigable waters or ports within said district, or that may be necessary or required for or in aid of the development of industries on said lands, and the acquisition of said lands for said purposes and operations and industrial development of such port and waterways is a public purpose and a matter of public purpose and a matter of public necessity.

B. In this connection you are further instructed that plaintiff, Willacy County Navigation District, through its Board of Navigation and Canal Commissioners, has the exclusive power to determine the necessity of taking defendant's property except where the exercise of such power involves a clear abuse of discretion.

SPECIAL ISSUE NUMBER 1:

Do you find by a preponderance of the evidence that the action of the Board of Navigation and Canal Commissioners on April 5th, 1948, in seeking to condemn the 1,760 acres (exclusive of the minerals and all mineral rights), described in the petition of the Navigation District, was a clear abuse of discretion?

You will answer this issue "yes" or "no."

We, the Jury, answer: NO

SPECIAL ISSUE NUMBER 2:

Do you find by a preponderance of the evidence that the action of the Board of Navigation and Canal Commissioners on April 5th, 1948, in seeking to condemn the fee to the entire surface of said 1,760 acres (exclusive of the minerals and all mineral rights), as distinguished from a perpetual easement, was a clear abuse of discretion?

You will answer this issue "yes" or "no."

We, the Jury answer: NO

SPECIAL ISSUE NUMBER 3:

Do you find by a preponderance of the evidence that the surface of the 1,760 acres (exclusive of all minerals or mineral rights), condemned by the navigation district, had a market value on June 23rd, 1948?

In this connection, you are instructed that by the term "market value" as used in this charge, is meant a price in cash at which a willing purchaser, ready, able and willing but under no compulsion to buy, would purchase, and at which an owner, able and willing but under no compulsion to sell, would sell, the property in question.

You will answer this issue "yes" or "no."

We, the Jury answer: NO

If you have answered the last foregoing special issue "no," then you will answer the following special issue:

SPECIAL ISSUE NUMBER 4:

Do you find by a preponderance of the evidence that on the 23rd day of June, 1948, any portion of the surface of the 1760 acres (exclusive of the minerals and all mineral rights) so condemned by the navigation district and described in the navigation district's petition, had a market value?

You will answer this issue "yes" or "no."

We, the Jury, answer: NO

If you have answered the last foregoing special issue "yes," then you will answer the following special Issues 5, 6 and 7; if you answer Special No. 4 "no," then answer Special No. 7 only.

SPECIAL ISSUE NUMBER 5:

How many acres of the surface of the 1,760 acres (exclusive of the minerals and all mineral rights), so condemned by the navigation district, if any, do you find by a preponderance of the evidence had a market value on June 23rd, 1948?

You will answer this issue in number of acres.

We, the Jury, answer: ————————

SPECIAL ISSUE NUMBER 6:

What do you find by a preponderance of the evidence was the reasonable market value of the surface of the lands, if any, (exclusive of the minerals and all mineral rights) which you have found did have a market value on June 23rd, 1948?

You will answer this issue in dollars and cents, if any.

We, the Jury, answer: ————————

SPECIAL ISSUE NUMBER 7:

What do you find by a preponderance of the evidence was the reasonable actual cash value of the surface of the lands, if any (exclusive of the minerals and all mineral rights) which did not have a market value on June 23rd, 1948?

In this connection, you are instructed that the term "actual cash value" of the property involved herein means the price the land would sell for in cash, taking into consideration the location of the lands and all the uses made of the land, its productivity and all the uses to which it might be adapted (except for navigational purposes), and the value it may have to the owners.

You will answer this issue in dollars and cents, if any.

We, the Jury, answer: $6,213.00.

You are charged, as a part of the law in this case, that any fact before you may be established by circumstantial evidence or direct evidence or both. In this connection you are also charged that a fact is established by direct evidence when proved by witnesses who saw the acts done or heard the words spoken. A fact is established by circumstantial evidence when the existence of it is fairly and reasonably inferred from other facts proved in the case.

Respectfully submitted:

/s/ Arthur A. Klein

Judge Presiding

We, the Jury, having answered the foregoing special issues as indicated, do herewith return the same into Court as our verdict herein.

/s/ W. A. Cooley

Foreman of the Jury."

and such cause having been tried and determined as in other civil cases in such Court, and such verdict having been received by the Court and filed and entered of record

in the Minutes of the Court, and after full hearing, it appearing from the pleadings and the evidence as well as from such verdict that such property should be condemned as prayed for by Petitioner, that such owners, Edwin K. Atwood, Alice B. Atwood and Thomas Hart Fisher, of Defendants, should recover of Petitioner $6,213.00, together with interest on the sum of $933.00 from June 23, 1948, to the date hereof at the rate of six (6%) per cent per annum, damages, and that Willacy County Navigation District should pay all the costs of these proceedings:

IT IS ACCORDINGLY, ORDERED, ADJUDGED AND DECREED that such decision of said Commissioners be recorded in the Minutes of this Court and be, and it is hereby made, the Judgment of this Court, save and except as to the easement on the minerals originally sought by Petitioner and dismissed from these proceedings, and that Willacy County Navigation District, Petitioner, do have and recover of D. B. Tarlton, Guardian of the Estate of Richard W. Atwood, a person of unsound mind; Edwin K. Atwood; Alice B. Atwood; Richard King, Individually, as Independent Executor of the Estate of Henrietta M. King, Deceased, and as Trustee under the Will of Henrietta M. King, Deceased; John D. Finnegan, as Trustee under the Will of Henrietta M. King, Deceased; Richard M. Kleberg, Individually, as Trustee under the Will of Henrietta M. King, Deceased, as Surviving Executor of the Estate of Robert J. Kleberg, Sr., Deceased, and as Executor of the Estate of Alice G. K. Kleberg, Deceased; Robert J. Kleberg, Jr., Individually, as Trustee under the Will of Henrietta M. King, Deceased, as Surviving Executor of the Estate of Robert J. Kleberg, Sr., Deceased, and as Executor of the Estate of Alice G. K. Kleberg, Deceased; Elizabeth A. Baldwin and husband, James P. Baldwin; Mary K. Estill and husband, Gentry Estill;

Minerva K. Patch and husband, J. Dorst Patch; King Ranch, a Texas corporation; Fisher, Boyden, Bell, Boyd and Marshall, a law firm; Thomas Hart Fisher; Alejandro G. Trevino Post No. 390, Incorporated, American Legion, a Texas corporation, Defendants, the fee simple title to the surface (exclusive of minerals and all mineral rights) of the following described property:

> Being out of and a part of the San Juan de Carricitos Grant in Willacy County, Texas, described by metes and bounds as follows:
>
> STARTING with the U. S. Coastal and Geodetic Survey, permanent bench SAUZ, which is located as latitude 26 degrees, 32 minutes, 16.012 seconds and longitude 97 degrees, 25 minutes, 13.527 seconds;
>
> THENCE, at an azimuth 202 degrees, 32 minutes, for a distance of 351.4 feet, to the south-east corner of the proposed tract;
>
> THENCE west (azimuth 270 degrees, 0 minutes) for a distance 7,940 feet to the south-west corner of said tract;
>
> THENCE north (azimuth 0 degrees, 0 minutes) for a distance 11,880 feet to the northwest corner of this tract;
>
> THENCE east (azimuth 90 degrees, 0 minutes) for a distance of 5,280 feet to the north-east corner of said tract; This corner being a point on the shore line of Red Fish Bay;
>
> THENCE generally southward, following the ordinary high tide line of Red Fish Bay, to beforementioned starting point of the tract, same being the south-east corner of the tract;
>
> containing 1760 acres of land, more or less;

and that the same is hereby decreed to and vested in the said Petitioners; that Edwin K. Atwood, Alice B. Atwood and Thomas Hart Fisher, of Defendants, do have and re-

cover of Willacy County Navigation District, Petitioner, $6,492.62 as damages for the fee simple title to the surface (exclusive of minerals and all mineral rights) of the lands hereinabove described and that Willacy County Navigation District, Petitioner, pay all costs of these proceedings and of this Court.

And it further appearing to the Court that there is on deposit in the Registry of this Court, in this cause the sum of $10,560.00 in money, such deposit having been made by Willacy County Navigation District, Petitioner, on June 23, 1948, in compliance with Article 3268, Revised Civil Statutes of Texas, as amended, the Clerk of this Court is ordered to withhold from said sum the sum of $6,492.62, $1,785.47 thereof subject to the order of Edwin K. Atwood, $1,785.47 thereof subject to the order of Alice B. Atwood, and $2,921.68 thereof subject to the order of Thomas Hart Fisher, and to pay out of the remainder of said sum so held in the Registry of this Court the costs assessed against Petitioner and deliver the remainder thereof to Petitioner, Willacy County Navigation District, and it is accordingly ORDERED, ADJUDGED AND DECREED that Willacy County Navigation District, Petitioner, do have the immediate possession of and right of entry upon the said lands hereinabove described for which it may have its writ of possession.

RENDERED AND SIGNED this 17th day of June, 1953

(Signed) Arthur A. Klein
Judge Presiding

ENDORSED: No. 1692 In the District Court of Willacy County, Texas 107th Judicial District. Willacy County Navigation District vs. Edwin K. Atwood, et al. Final Judgment Filed 17th day of June, 1953, Byrne James, Clerk District Court, Willacy County, Texas, by J. J. Taylor, Deputy.

APPENDIX D.

JUDGMENT OF THE COURT OF CIVIL APPEALS

Wednesday, May 19, 1954

Edwin K. Atwood et al., Appellants,

No. 12660 vs.

Willacy County Navigation District, Appellee.

Appealed from the 107th District Court of Willacy County

This cause came on to be heard on the transcript of the record, and the same being examined, because it is the opinion of the Court that there was no error in the judgment of the Court below, it is therefore considered, adjudged and ordered that said judgment be, and it is hereby affirmed.

It is further ordered that Appellants, Edwin K. Atwood, Alice B. Atwood and Thomas Hart Fisher, and surety, United States Fidelity & Guaranty Company, pay all costs in this behalf expended and incurred, and this decision be certified below for observance.

ORDER OF THE COURT ON MOTION FOR REHEARING

Wednesday, June 23, 1954

Edwin K. Atwood et al., Appellants,

No. 12660, vs.

Willacy County Navigation District, Appellee.

From Willacy County.

The Motion of Appellants for Rehearing, and for Supplemental Findings, filed June 3, 1954, coming on to be

heard, it is ordered that said motion be, and it is hereby, overruled; that appellants, Edwin K. Atwood, Alice B. Atwood and Thomas Hart Fisher, and surety, United States Fidelity & Guaranty Company, pay all costs of this motion.

APPENDIX E.

IN THE SUPREME COURT OF TEXAS

No. A-4847 November 24, 1954

Edwin K. Atwood et al

vs.

Willacy County Navigation District

From Willacy County—4th District.

This day came on to be heard the application of petitioners for a writ of error to the Court of Civil Appeals for the Fourth District and the same having been duly considered, and the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be refused; that the applicants, Edwin K. Atwood, Alice B. Atwood and Thomas Hart Fisher, and surety, United States Fidelity and Guaranty Company, pay all costs incurred on this application.

No. A-4847 March 9, 1955

Edwin K. Atwood et al

vs.

Willacy County Navigation District

From Willacy County—4th District.

This day came on to be heard the motion for rehearing of application for writ of error filed herein by the petitioners, same having been heretofore submitted to the Court, and after due consideration, it is ordered that the motion be, and is hereby, overruled.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court of Texas on the application for writ of error styled and numbered as above on the docket of said Court.

WITNESS my hand and the seal of said Court, at the City of Austin, this the 29th day of March A.D. 1955.

Geo. H. Templin, Clerk
Geo. H. Templin

FILED
JUL 18 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 174

EDWIN K. ATWOOD, ALICE B. ATWOOD and THOMAS HART FISHER,
Appellants,

vs.

WILLACY COUNTY NAVIGATION DISTRICT,
Appellee.

On Appeal from the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, sitting at San Antonio, Texas, and the Supreme Court of Texas

APPELLEE'S MOTION TO DISMISS THE APPEAL

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Of Counsel:

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The people of Texas, with their intimate knowledge of local conditions and requirements, acting through their Legislature, and their Courts, have declared by the Statute and Court decisions now under attack, as a public use and a matter of public necessity the operation *and industrial development* of ports and waterways. This Court has traditionally and consistently declined to hold such declarations unconstitutional. The first question presented by Appellants (Jurisdictional Statement, page 6) is therefore not substantial 4

Statement in Opposition to Question No. II. Presented by Appellants:

Appellee, a public agency of the State of Texas, condemned Appellants' land for its own and the public's use, not for use by the United States Government. The second question presented by Appellants (Jurisdictional Statement page 6) is therefore not substantial 11

Statement in Opposition to Question No. III. Presented by Appellants:

The judgment condemning Appellants' land took from them and decreed to and vested in Appellee "the fee simple title to the surface (exclusive of minerals and all mineral rights)." The minerals and all mineral rights thus remained vested in Appellants and nothing contained in the

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judgment makes it impossible nor in any way impairs their right to exploit them. The third and last question presented by Appellants (Jurisdictional Statement page 6) is therefore insubstantial 15

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No.....

EDWIN K. ATWOOD, ALICE B. ATWOOD and THOMAS HART FISHER,

Appellants,

vs.

WILLACY COUNTY NAVIGATION DISTRICT,

Appellee.

On Appeal from the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, sitting at San Antonio, Texas, and the Supreme Court of Texas

APPELLEE'S MOTION TO DISMISS THE APPEAL

Comes now, WILLACY COUNTY NAVIGATION DISTRICT, Appellee, and moves to dismiss this appeal on the following grounds:

1. This appeal is not within the jurisdiction of this Court because same was not taken in conformity to Rule 13 of this Court, the Jurisdictional Statement having been filed herein more than sixty days after notice of appeal was filed, April 22, 1955, with the Clerk of the Court possessed of the record.

2. None of the three questions presented by Appellants (their Jurisdictional Statement, page 6) presents a substantial federal question.

3. The State Court judgment rests on an adequate non-federal basis.

Opening Statement in Support of Motion to Dismiss

Appellants' Jurisdictional Statement, pages 1-5 inclusive, is in part correct and in part incorrect.

Not challenged is their first paragraph, pages 1 and 2, except their averment that a substantial question is presented.

Their statement regarding the "Opinion Below" (p. 2) is correct.

Their statement regarding "Jurisdiction" (pp. 2-5) is for the most part incorrect. It is true that Appellee, a statutory agency, a navigation district of the State of Texas, has condemned 1760 acres, more or less, of the surface estate of Appellants' land, exclusive of the minerals and all mineral rights, but the purposes for which this land was condemned appear exclusively in a resolution adopted, on April 5, 1948, by the Canal and Navigation Commissioners of Appellee District, reported in Vol. 4, pp. 1253-1256 of the Statement of Facts herein. (Appendix A hereto, page 23). In such resolution, the Appellee's governing body officially declared the necessity for this exercise of its right and power of eminent domain. The necessity or expediency of the exercise of this right and power, by the public agency to which it has been

lawfully delegated, is conclusive upon the Courts, since such a question is essentially political in its nature and not judicial. *Housing Authority* v. *Higginbotham* (Sup. Ct. of Texas), 143 SW2d 79; *Meaney* v. *Nueces County Navigation District*, 222 SW2d 402; *McIntyre* v. *Brown County Water Imp. Dist.*, 41 SW2d 741, followed in *Cox* v. *same*, 45 SW2d 1118, and *McInnis* v. *Same*, 45 SW2d 1118; *National Association of Audubon Societies* v. *Arroyo Colorado Navigation District*, 110 SW2d 150.

It was upon this resolution that the entire proceeding for Condemnation was based. (See opinion of State Court of Civil Appeals, first paragraph commencing on page 28, Appellants' Jurisdictional Statement.) Appellants showed no fraud or abuse of discretion in connection with its adoption. All courts are therefore bound by its expressed purposes and intendments, and Appellants' attempt, for their own purposes, to read into it various interpretations that are at variance with its plain language should be unavailing.

Attention is especially invited to the footnote appearing at Appellants' page 5, to the third paragraph on page 15, and to their last paragraph beginning on page 24. Appellee made no concession or admission in its brief in the Texas Appellate Courts, or elsewhere, to the effect that the condemnation judgment was erroneous "because it permanently destroyed Appellants' right of ingress and egress and use of the 'surface' for exploitation of the minerals", or that "Appellants had been permanently deprived of their mineral rights", etc. That part of Appellee's said brief discussing the subject will be fully quoted below.

Appellants' reference to the "Statutes Involved" (their p. 6) is accurately stated.

Statement in Opposition to Question No. I Presented by Appellants

The people of Texas, with their intimate knowledge of local conditions and requirements, acting through their Legislature, and their Courts, have declared by the Statute and court decisions now under attack, as a public use and a matter of public necessity the operation AND INDUSTRIAL DEVELOPMENT of ports and waterways. This Court has traditionally and consistently declined to hold such declarations unconstitutional. The first question presented by Appellants (Jurisdictional Statement, page 6) is therefore not substantial.

"While the Supreme Court of the United States has laid down the rule that a taking of property for private use is a taking without due process of law, it has never actually decided that a particular use is private, where the people of the State, with their intimate knowledge of local conditions and requirements, acting through their legislature, their courts, or even their fundamental law, had declared it to be public." 18 Am. Jur. 677, Sec. 47.

Probably the farthest that the Federal courts have carried this doctrine appears in the case of the *People of Puerto Rico* v. *Eastern Sugar Associates, et al*, 156 F 2d 316, decided by the United States Circuit Court of Appeals for the First Circuit in June, 1946. The Supreme Court of the United States denied certiorari in this case (91 L. Ed. 664). The Insular Legislature

of Puerto Rico in 1941 passed a statute called the "Land Law of Puerto Rico" by which was launched a far-reaching program of agrarian reform. The statute was long and complicated but its purpose was to break up large land holdings and to distribute and transfer the same to "agregados" or "squatters" who were defined in the Act as "any family head residing in the rural zone whose home is erected on the lands of another person or a private or public entity and whose only means of livelihood is his labor for a wage." (See footnote page 318 of Decision.) The statute stated such to be a public use and provided that private property could be acquired by eminent domain for the purpose. In other words, the law provided that the public authority charged with carrying out the purposes of the Act could condemn land owned by private landowners and transfer the same to other private landowners. The question before the Court was whether or not the Legislature of Puerto Rico exceeded its authority, or, as the Court stated (right-hand column, p. 320), "the basic question presented is whether on the pleadings it can be said that the appellants' land is sought to be taken for a public use." The Court held that the statute did not violate either the Fifth or the Fourteenth Amendment of the Constitution of the United States, that it did not deny due process merely because the purpose for the taking was allegedly only to sell or lease the land to others for use by them personally instead of for use by the general public. We quote from the opinion: (commencing the lefthand column, page 323)

> "We are not, or course, concerned with the wisdom, expediency or even directly with the necessity of the uses for which the land is proposed to

be taken. These are legislative questions with which it is clearly established we have nothing whatever to do. 'The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.' Chicago, B. & Quincy R. Co. v. McGuire, 219 U.S. 549, 569, 31 S.Ct. 259, 263, 55 L.Ed. 328. See also Rindge Co. v. Los Angeles, 262 U.S. 700, 709, 43 S.Ct. 689, 67 L.Ed. 1186, and cases cited. Our sole concern is with the question whether the Insular Legislature exceeded its power, specifically, whether the proposed taking deprives the Appellees of their property without due process of law.

"The argument is made that due process is denied because the purpose for taking the appellee's land is only to sell or lease it to others for them to use personally instead of for use by the general public. This argument has been advanced several times in the Supreme Court of the United States in cases of this sort and every time it has been rejected. In Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 162, 17 S. Ct 56, 64, 41 L. Ed. 369, decided in 1896, the Supreme Court considered the argument fully and in the light of that consideration announced that 'It is not necessary, in order that the use should be public, that every resident of the district should have the right to the use of the water.' It was considered, and rejected again in Clark v. Nash, 1905, 198 U. S. 361, 367, 25 S. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas.

1171 et seq., and in Strickley v. Highland Boy Mining Co., 1906, 200 U. S. 527, 531, 26 S. Ct. 301, 50 L. Ed. 581, 4 Ann Cas. 1174; and in 1916 in Mt. Vernon Cotton Co. v. Alabama Power Co., 240 U. S. 30, 32, 36 S. Ct. 234, 236, 60 L. Ed. 607, Mr. Justice Holmes speaking for a unanimous court said: 'The inadequacy of use by the general public as a universal test is established.' Then later in 1923 in Rindge Co. v. Los Angeles, supra, page 707, of 262 U. S., 43 S. Ct. 692, 67 L. Ed. 1186, the Supreme Court said: 'It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use.'

"It does not follow from this, however, that a taking of property from one, for the purpose of transferring it to another, without anything more, conforms to due process of law. Some public benefit or advantage must accrue from the transfer and mere financial gain to the taker is not enough, since the Supreme Court has intimated that the power of eminent domain cannot be used for the taking authority in aid of 'an outside land speculation.' Brown v. United States, 263 U. S. 78, 84, 44 S. Ct. 92, 94, 68 L. Ed. 171. But the local Legislatures nevertheless have wide scope in deciding what takings are for a public use. This is definitely established by the facts arising under the Fourteenth Amendment already cited and by many more. In the first place a state's power of eminent domain does not necessarily have to be rested upon the ground that the taking is considered necessary for the public health, but may be exercised if the taking 'be essential or material for the prosperity of the community.' Fallbrook Irrigation District case, 164 U. S. page 163, 17 S. Ct. 65, 41 L. Ed. 369. And in the second place a local Legislature, because of its intimate knowledge of local conditions, has great latitude in de-

termining what uses of land are conducive to community prosperity. The wide scope allowed a State Legislature in this respect is emphasized in Clark v. Nash, supra, and in Cincinnati v. Vester, 281 U. S. 439, 446, 50 S. Ct. 360, 362, 74 L. Ed. 950 decided in 1930, the Supreme Court, citing many cases, said that although the question of what is a public use is a judicial one 'In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies.' In fact in Old Dominion Co. v. United States, 269 U. S. 55, 56, 46 S. Ct. 39, 40, 70 L. Ed. 162, cited with approval in United States, ex rel, Tennessee Valley Authority, v. Welch, supra, the Supreme Court said that a legislative decision that a given use is public 'is entitled to deference until it is shown to involve an impossibility.' "

It will be noted that the Puerto Rico law that was upheld by the court went so far as to authorize the sale or lease of such property after condemnation. The statute under consideration in the instant case does not authorize the navigation district to *sell* condemned property to private industry, but merely authorizes the leasing of same in connection with the development of the port.

"Even the Supreme Court of the U. S. in interpreting a Constitution which applies alike to every state of the union, has frequently recognized the propriety of keeping in view the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses. While the Supreme Court has frequently enunciated the rule that a taking of property for private use is a

taking without due process of law, and there have come before it cases which, to say the least, go to the verge of legislative power, it is worthy of note that this Court has never actually held a use to be private which the courts of a state, with their inimate knowledge of local conditions and requirements, and with the concurrance of the Legislature or even of the people of the state, have declared to be public." 2 Nichols on Eminent Domain, p. 442, sec. 7. 212 (1), citing *O'Neill* v. *Leamer*, 60 L.Ed. 249, *Rindge* v. *Los Angeles County*, 67 L.Ed. 1186, *Cincinnati* v. *Vester*, 74 L.Ed. 950.

This Court in *United States* v. *Welsh*, 66 S.Ct. 715 stated, p. 718, "and in *Hairston* v. *Danville & W. Ry. Co.*, 208 U.S. 598, 607, 28 S.Ct. 331, 334, 335, 52 L.Ed. 637, 13 Ann. Cas. 1008, this court, referring to the 'rule' later stated in the Vester case, said that 'No case is recalled where this court has condemned, as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws.' And see *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U.S. 239, 257, 260, 261, 25 S.Ct. 251, 258, 259, 260, 49 L.Ed. 462. But whatever may be the scope of the judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject 'Its decision is entitled to deference until it is shown to involve an impossibility.' *Old Dominion Land Co.*, v. *United States*, 269 U.S. 55, 56, 46 S.Ct. 39, 40, 70 L.Ed. 162. Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a

practice which has proved impracticable in other fields."

This honorable Court has declined to interfere with the condemnation by one person of an easement over the land of another for the construction of an irrigation ditch *for his own use. Fallbrook Irr. Dist.* v. *Bradley*, 41 L.Ed. 369, *Clark* v. *Nash*, 49. L.Ed. 1085; or of a right of way over the land of another for an aerial bucket line, *Strickley* v. *Highland Boy Mining Co.*, 50 L.Ed. 581; or of the right to flood the land of another by the erection of a dam, *Head* v. *Amoskeag*, 28 L.Ed. 889; *Otis* v. *Ludlow* 50 L.Ed. 696; or of the right to construct a spur track over the land of another, *Houston* v. *Danville Ry. Co.* 52 L.Ed. 637; or with the taking of land and water rights to facilitate the manufacture or distribution of hydro-electiric power, *Mt. Vernon-Woodberry Co.* v. *Alabama I. P. Co.*, 60 L.Ed. 507.

The taking of land by the Appellee navigation district at a locality so distant from its public port and waterway that it could have no substantial relationship with the development of the port itself, might be an impossibility. The statute here in question requires, however, that the land must be "adjacent or accessible to the navigable waters and ports developed by them."

In compliance with this requirement Appellee condemned land all in one body and built their port thereon.

Reference is again made to the resolution of Appellee's governing body, dated April 5, 1948 (Appendix A, page 23). It can be noted therefrom that every

declared purpose for the condemnation of Appellants' 1760 acres falls squarely within the provisions of Section 59, Article XVI, of the Constitution of Texas (Appendix B, page 27), and of the statute now under attack by Appellants (their Appendix page 42). What was done by Appellee's Board was clearly authorized by the statute, and all the expressed purposes were, by the statute, expressly authorized in the following language, "The acquisition of said lands for said purposes and the operation and industrial development of such ports and waterways are hereby declared to be a public purpose and a matter of public necessity."

Appellants' quotation of the statute in their Appendix page 43 omits a part of its provisions, as follows, "if any paragraph, clause, or provision of this Act shall be held unconstitutional, the remainder hereof shall not be affected thereby but shall remain in full force and effect."

Statement in Opposition to Question No. II Presented by Appellants

Appellee, a public agency of the State of Texas, condemned Appellants' land for its own and the public's use, not for use by the United States government. The second question presented by Appellants (Jurisdictional Statement page 6) is therefore not substantial.

There is nothing in the record of this case that sustains Appellants' proposition that Texas condemned their property for the use of the Federal Government. The resolution of Appellee's governing body that forms

the basis for this condemnation action (Appendix A hereto, page 23); Statement of Facts, pages 1253-1256) speaks for itself. It is not assailable in the courts in the absence of fraud or clear abuse of discretion. Neither was shown by Appellants.

It is obvious from the record of this case that the Appellee navigation district was created for the purpose of establishing a barge port within its own boundaries on the intracoastal canal that traverses the State of Texas along and generally parallel with the Gulf of Mexico. This inland waterway connects, at the Sabine River, with a similar waterway that traverses Louisiana and points to the east. It ties in also with the Mississippi River, and, through it, with all of its tributaries that carry barge traffic. This entire system of inland waterways is well known to be one of the most important traffic arteries of the country.

It became necessary after a site for this port was located and the land acquired, to dredge a channel from the canal to the port and to dredge the port itself. It became necessary also to provide land, in addition to that required for all other purposes, on which the spoils from the dredging operation could be deposited. Land for the spoils was just as necessary and essential to the establishment of the port as was land for the port proper, and land for both purposes was condemned for the use of Appellee district.

In order to accomplish the construction of the port and waterway connecting it with the intracoastal canal, it became necessary that Appellee utilize the services of some one equipped and able to do the job. The fact that the services of the Corps of Engineers,

United States Army, were thus utilized, rather than by contract with some private dredging concern, does not place Appellee in the position of condemning any part of Appellants' land for the use of another sovreignty. The dumping of the spoils was in furtherance of the lawful objects of Appellee and was a necessary incident thereof. Appellee still owns and controls the spoilage area.

Appellee's port director, Charles R. Johnson, testified (Statement of Facts, pages 893-895) that the intracoastal canal from Corpus Christi to Brownsville (Port Isabel), Texas, was completed about April, 1949, that the U. S. Army Corps of Engineers, Civil Section constructed the channel connection or lead-in channel from Port Mansfield (name of Appellee's port) turning basin to the intracoastal canal; that the first dredging of the Port Mansfield turning basin was done under the supervision of the Corps of Engineers, but that additional turning basin dredging was done by the Navigation District (Appellee) itself.

It cannot be assumed as a matter of law that Appellee did not have as its object, in condemning property for the deposit of the spoilage, other legitimate future uses of the property, having nothing to do with spoilage or with the Corps of Engineers. The contrary is shown, not only by the broad language of the official resolution to condemn, but by the following testimony of Appellee's board chairman, Mr. McManus, who testified in this case (Statement of Facts, page 929):

> "A. We anticipated we would need an additional four hundred acres there, with the hope that later on in the development of the port we might, through the spoiling

on the spoil area, re-claim some of that for further development.

Q. Further industrial development?

A. Yes, sir.

Q. Did you have in mind any particular industry for any of those areas?

A. No, sir, not any particular. We had several in mind, of course.

Q. That you hoped to have, but didn't have any particular area set aside for any particular industry?

A. That's right."

Also (S.F. 938) the Chairman, Mr. McManus, testified:

"Q. And I believe you mentioned also that you had in mind you could probably re-claim some areas and lease that to industries, also?

"A. Yes, sir, for the future development."

It is thus seen that although some of the dredging and deposit of spoils was accomplished by an agency of the United States, it is clear that it was done exclusively for the use and benefit of Appellee Navigation District in furtherance of its legitimate objectives. It is clear also that all the land condemned was for the exclusive use and benefit of Appellee in furtherance of the exercise of its lawful public purposes.

There is thus no federal question involved.

Statement in Opposition to Question No. III Presented by Appellants.

The judgment condemning Appellants' land took from them and decreed to and vested in Appellee "the fee simple title to the surface (exclusive of minerals and all mineral rights)". The minerals and all mineral rights thus remained vested in Appellants and nothing contained in the judgment makes it impossible nor in any way impairs their right to exploit them. The third and last question presented by Appellants (Jurisdictional Statement page 6) is therefore insubstantial.

(The following statement is an exact copy of that part of Appellee's Brief in the Court of Civil Appeals of Texas, on the subject of minerals and mineral rights. It will refute the alleged concessions and admissions imputed by Appellants to Appellee, referred to above, as well, we think, as to demonstrate the insubstantiality of this one of the questions presented to this Court by Appellants.)

ARGUMENT AND AUTHORITIES
OFFER TO REMIT

This case was tried on the theory that where the condemner takes the surface estate only, 'exclusive of minerals and all mineral rights', the rights of the owner of the mineral estate to enter upon the surface for purposes of exploring for and developing the minerals thereon are unaffected.

The court so charged the jury (Tr. p. 78). Appellee is of the opinion the charge was correct. One of Appellee's counsel, Roger F. Robinson, Esq., in effect, so stated during the trial. Under cross-examination by Appellants' counsel, a valuation witness called by Appellee, was asked, "Did you consider the fact that this . . . that the area is from a mile to a mile and a half wide in one direction, and over two miles in the other, and that if the surface is gone and I own the minerals only, my minerals are going to be effected because I don't have the surface rights to go after them?" Mr. Robinson said, "I object to that . . .as the Court well knows, the owner of mineral rights has the right always to a use of the surface to develop the minerals." Appellants' counsel rejoined, "I want to make sure that admission gets in the record . . ." to which Mr. Robinson replied, "It's no admission; it's the law." (S.F. 763-64; quoted also in Appellants' Brief p. 131.)

Appellees have not departed from that position. We are of the opinion that the law expressed by the Texas Supreme Court in *Harris* v. *Currie*, (1943) 176 SW 2d 302, affirming (Civ. App. 1943), 172 SW 2d 404, is just as applicable in a case, like this, where the surface estate is taken by condemnation judgment, reserving to the private owner 'the minerals and all mineral rights', as it is in cases of voluntary conveyances where the two estates are severed.

See also citation of cases under Sec. 52 Vol. 31A, Tex. Jur. p. 95-96, and *Branham* v. *Minear*, (Civ. App. 1947) 199 SW 2d 841, error refused. The statement of law that we refer to is contained in *Harris* v. *Currie*, at (5), left column page 305, and reads as follows:

"5) The mere grant or reservation of minerals in place does not vest the grantee or reserver with any title to the surface. In spite of this, the grant or reservation of minerals carries with it, as a necessary appurtenance thereto, the right to use so much of the surface as may be necessary to enforce and enjoy the mineral estate conveyed or reserved. This is because a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved. 31 Tex. Jur. p. 559 et seq., and authorities there cited."

The judgment in the instant case vested in Appellee, without volition on the parts of the private owners, "the fee simple title to the surface (exclusive of the minerals and all mineral rights)." (Tr. 82, lines 30, 31, p. 80 lines 14-15.)

Our opinion would be the same had the parenthetical exclusion been merely "exclusive of minerals" without the addition of the words "and all minerals rights." The owners of the mineral estate would still have their easement to enter on the surface for purpose of devel-

opment of their minerals. Any doubt on that score is removed by the use in the judgment of the additional words, "and all mineral rights."

"The minerals" are all the physical, actual earth materials, on or under the surface. The judgment, "exclusive of the minerals", expressly left these in full ownership of Appellants, with, we think, the appurtenant right to go on the surface for purposes of utilizing them and exercising their ownership. All doubt is removed by the addition of the words, "and all mineral rights." This could have no meaning other than the rights of the mineral owners to do whatever is necessary to remove their minerals from the ground, including the right to go upon the surface for the purpose.

We think that the reason for the rule in *Harris* v. *Currie* is at least as compelling in cases of involuntary conveyance of the surface estate, as it is in cases of voluntary conveyance thereof.

The quoted parts of C. J. S. and of Nichols on "Eminent Domain" appearing at pages 134 and 135 of Appellants' Brief, are not applicable here since they deal with cases where the entire fee simple estate is taken, not to cases where the mineral estate is severed from the surface as in this case.

Calvert v. *Harris County*, 46 SW 2d 375 (cited and discussed in Appellants' Brief, p.

133 and 136) is but a realistic application under the particular facts of that case of the rule that in such cases the right to use the surface for mineral development is to be reasonably exercised with due regard to the rights of the owner of the surface. (*Tex. Pac. Coal & Oil Co.* v. *Truesdell*, Civ. App. 1945, 187 SW 2d 418.) The narrow (40 ft.) right of way acquired by the condemner was for use as a roadway. A drilling rig or producing well in the middle of the road would unreasonably interfere with use of the road. Since the owner of the minerals under the roadway owned also the surface and minerals along side the road, he could, due to the migratory nature of oil and gas, reduce the same to possession at the surface by drilling off the road. Likewise, as to solid minerals, he could dig a shaft off the right of way and by digging laterally, a very short distance, get to his minerals. Or, again in the case of petroleum, he could easily start his well off the right of way, and with directional drilling, put the bottom of his hole directly under the right of way. Had the 40 foot strip been all the condemnee owned, we are confident the court would have made provision either for the right of entry onto the roadway itself for mineral development purposes, or would have awarded damages for the loss of the right.

In the instant case it is conceded that, due to the size of the tract taken, the Appellants would lose a potentially valuable right if they were deprived of the right of entry on the

surface for mineral purposes. Off-set or even directional drilling could recover part, but not all, of their minerals.

As indicated above, we think this Court should apply the doctrine of *Harris* v. *Currie* to cases of condemnation, or at least to this case where the judgment expressly reserves to condemnee "the minerals *and all mineral rights.*"

If this Court is unwilling to do so, it might follow that the judgment gave Appellee *exclusive rights* to go upon the surface, i.e., that the rights of ingress and egress that the condemnees had prior to the judgment, including their right to be on the surface for purpose of recovering their minerals, are now vested in Appellee, by virtue of the judgment, and divested from Appellants.

If that be the legal effect of the judgment, Appellee here and now tenders a remission of such rights insofar as the judgment may have deprived Appellants of their right of ingress and egress and use of so much of the surface as may be necessary in the development of their mineral estate by exploring for, producing, storing, transporting and marketing their minerals. This remittitur may be effectuated by remand to the trial court with instructions to reform or amend its judgment in accordance therewith and in such language as this Court may deem proper.

Where the Texas Courts, as in *Harris* v. *Currie*, 176 SW 2d 302, hold that the owner of the reserved mineral estate has, as a necessary appurtenance thereto, the right to use so much of the surface as may be necessary to enforce and enjoy the same, there is no constitutional question for this Court to decide. Appellants' minerals were reserved to them by the judgment of condemnation, as also were their mineral rights. The minerals and rights pertaining thereto were not condemned, Appellants still own them and can enjoy them to the full extent that they could before the surface estate, only, was condemned.

In the instant case, the Texas Court of Civil Appeals had before it a point of error, presented by Appellants, their Eighteenth Point, that raised the same question they raise here, e.g. that their mineral rights were cut off by the judgment of the trial court, and were taken from them without just compensation. The Court of Civil Appeals in its opinion did not discuss the point other than to say, in the last paragraph thereof, (Appellants' Jurisdictional Statement, page 42), "We have examined and considered all of Appellants' points of error. In our opinion, none of them discloses a reversible error and the judgment appealed from is accordingly affirmed.

In view of *Harris* v. *Currie*, supra, and of Appellee's admission that the trial court judgment left Appellants in full ownership of the minerals, together with all rights normally incident and appurtenant thereto, including the right of ingress and egress for purposes of exploring for, developing and producing the minerals, in further view of Appellee's offer to have such judgment reformed, if deemed necessary, by the Court

of Civil Appeals, to accomplish such purposes, and in view also of said Court's inaction regarding such offer, it appears conclusive that Appellants were not deprived of their minerals, or of such appurtenent rights, but on the contrary remain in full ownership and possession of the same.

It is beyond understanding why Appellants persist with this point.

CONCLUSION

It is again respectfully moved, for the reasons above given, that this appeal be dismissed, at Appellants' cost.

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Brownsville, Texas.

APPENDIX A

STATE OF TEXAS

COUNTY OF WILLACY

BE IT REMEMBERED THAT ON THE 5th day of April, 1948, there was begun and beholden a special meeting of the Canal and Navigation Commissioners of the Willacy County Navigation District in the City of Raymondville, Texas, for the purpose of transacting any and all business that may lawfully be brought before the same.

The Commissioners met, and those present were:

F. E. Macmanus, Chairman

R. F. Allen, Secretary

Gustin Garrett, Member

AMONG OTHER BUSINESS APPEARED THE FOLLOWING:

IN THE MATTER OF LANDS REQUIRED BY WILLACY COUNTY NAVIGATION DISTRICT FOR IMPROVEMENTS:

On this the 5th day of April, 1948, at a special meeting of the Navigation and Canal Commissioners of Willacy County Navigation District, Willacy County, Texas, came on to be considered the matter of acquiring the lands necessary and/or required for making the

improvements in carrying out the purposes of the Willacy County Navigation District; and

It appearing to said Commissioners that in making the improvements for navigation of inland and coastal waters and for the preservation and conservation of inland and coastal waters for navigation and for the control of storm and flood waters of rivers, streams and canals in aid of navigation, and for any or all purposes as stated in Section 59, of Article XVI of the Constitution of the State of Texas, necessary and/or incidental to the navigation of inland and coastal waters or in aid thereof, and for any and all purposes incident to and/or necssary for the development and operation of navigable waters and ports developed by the Willacy County Navigation District within its boundaries and for or in aid of the development of industries thereon, it is necessary and/or required that it acquire fee simple title to the surface and an easement on the mineral rights over, on, in and under the following described lands:

Being out of and a part of the San Juan de Carricitos Grant in Willacy County, Texas, described by metes and bounds as follows:

Starting with the U. S. Coastal and Geodetic Survey, permanent bench SAUZ, which is located at Latitude 26 degrees, 32 minutes, 16.012 seconds and longitude 97 degrees, 25 minutes, 13.527 seconds;

THENCE, at an azimuth 202 degrees, 32 minutes, for a distance 351.4 feet, to the south-east corner of the proposed tract;

THENCE, west (azimuth 270 degrees, 0 minutes) for a distance 7,940 feet to the southwest corner of said tract;

THENCE north (azimuth 0 degrees, 0 minutes), for a distance 11,880 feet to the north-west corner of said tract;

THENCE east (azimuth 90 degrees, 0 minutes), for a distance of 5,280 feet to the north-east corner of said tract; This corner being a point on the shore line of Red Fish Bay;

THENCE generally southward, following the ordinary high tide line of Red Fish Bay, to beforementioned starting point of the tract, same being the south-east corner of the tract; containing 1760 acres of land, more or less.

IT IS, THEREFORE, UPON MOTION DULY MADE, SECONDED, AND UNANIMOUSLY CARRIED, ORDERED BY THE NAVIGATION AND CANAL COMISSIONERS OF WILLACY COUNTY NAVIGATION DISTRICT, That:

The fee simple title to the surface, and an easement on the mineral rights over, in, on and under the herein-

above described lands be acquired, and that the owners thereof, or the claimants of any right, title or interest therein, be offered the sum of Two Dollars ($2.00) per acre for such titles and rights.

ATTEST

S/R. F. ALLEN
Secretary

S/F. E. MACMANUS

S/R. F. ALLEN

S/GUSTIN GARRETT
(Statement of Facts,
pages 1253-1255.)

APPENDIX B

CONSTITUTION OF THE STATE OF TEXAS
ARTICLE XVI, Section 59

Conservation and development of natural resources; conservation and reclamation districts.

Sec. 59. (a) The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natuaral resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

(b) There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.

(c) The Legislature shall authorize all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment, and all such indebtedness may be evidenced by bonds of such conservation and reclamation districts, to be issued under such regulations as may be prescribed by law and shall also, authorize the levy and collection within such districts of all such taxes, equitably distributed, as may be necessary for the payment of the interest and the creation of a sinking fund for the payment of such bonds; and also for the maintenance of such districts and improvements, and such indebtedness shall be a lien upon the property assessed for the payment thereof; provided the Legislature shall not authorize the issuance of any bonds or provide for any indebtedness against any reclamation district unless such proposition shall first be submitted to the qualified property tax-paying voters of such district and the proposition adopted.

FILED
AUG 5 1955
HAROLD B. WILLEY, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 174

EDWIN K. ATWOOD, ALICE B. ATWOOD and THOMAS HART FISHER,

Appellants,

vs.

WILLACY COUNTY NAVIGATION DISTRICT,

Appellee.

On Appeal from the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, sitting at San Antonio, Texas, and the Supreme Court of Texas.

APPELLANTS' BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS.

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On Appeal from the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, sitting at San Antonio, Texas, and the Supreme Court of Texas.

APPELLANTS' BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS.

I.

Appellee's Motion To Dismiss The Appeal As Not Timely Should Be Denied.

This Court's Rule 11, paragraph 3, is in full as follows:

"3. An appeal in all other cases shall be *in time* when the notice of appeal prescribed by Rule 10 is

filed with the clerk of the appropriate court within the time allowed by law for taking such appeal." (Italics supplied.)

Appellants' notice of appeal was filed on April 22, 1955, or *44 days* after the judgment appealed from had become final by denial of petition for rehearing on March 9, 1955 in the Supreme Court of Texas. It was thus filed "within the time allowed by law for taking such appeal", which was 60 days under Section 2101(c) of the Judicial Code (28 U.S.C. 2101 (c)).

Appellants' jurisdictional statement was sent to this Court under letter of June 20, 1955, but solely because of a failure on the part of the printer was not mailed until the following day, June 21st. It reached the office of the Clerk on June 22, 1955, presumably in the morning, instead of the afternoon before.

The purpose of this Court's rules fixing the time for filing of the notice of appeal, transcript of record and the jurisdictional statement is to insure the prompt presentation of appeals to this Court and to discountenance dilatory prosecutions thereof.

It will be noted that if Appellants intended to be dilatory for any reason whatever, Appellants could have delayed the filing of their notice of appeal until the end of the 90-day period provided by Section 2101(c) of the Judicial Code (28 U.S.C. 2101 (c)) and could have deferred filing of the jurisdictional statement and record for the 60 additional days allowed by Rule 13. Had Appellants pursued this perfectly permissible course of action, the notice of appeal would have been filed June 7, 1955 and the jurisdictional statement and record would not even yet be due, *i.e.*, until August 6, 1955.

As a matter of fact, however, the notice of appeal, record, jurisdictional statement and proof of service were all filed within *104 days* instead of within the *150 days* authorized by the 90-day period for filing of the notice of appeal and the additional period of 60 days authorized for filing of the record and the jurisdictional statement.

As a matter of fact, therefore, Appellants have completed the docketing of the appeal 46 days before the time allowed by the statute and the Court's rules.

We respectfully submit that when this Court's own rules provide that appeals from State Courts shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed for taking such appeal and when Appellants have in fact fully presented their appeal 46 days before the maximum time allowed for such presentation, the ends of justice would be defeated by the granting of Appellee's extremely technical motion.

The only *jurisdictional* requirement is the filing of a timely notice of appeal under Section 2101(c) of the Judicial Code (28 U.S.C. 2101(c)) and Rule 11, paragraph 3. All other requirements are merely procedural.

The "duty" to docket and file the record is a merely procedural requirement not affecting the *jurisdiction* of this Court. In this respect the situation under Rules 10 and 13 is precisely analogous to that under Rule 73(a), (b) and (g) of the Federal Rules of Civil Procedure dealing with appeals to the Circuit Courts of Appeal, under which the notice of appeal is the only *jurisdictional* requirement, the docketing and filing of the record being merely procedural. See *R.F.C.* v. *Prudence Securities Advisory Group*, 311 U.S. 579; *Georgia Hardwood Lumber Co.* v. *Compania de Navagacion Transmar*, 323 U.S. 334.

All that is said above is confirmed by this Court's Rule 14, the last paragraph 3 of which states:

> "In no case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this paragraph, *unless by special leave of court.*" (Italics supplied.)

This Court could not conceivably have promulgated this rule if it had regarded the date of filing the jurisdictional statement as being jurisdictional rather than being merely procedural.

The entire spirit of modern appellate judicature is instinct with the principle that substantial justice must be done. In this case all of this Court's requirements have been met well within the time authorized and contemplated by the statute and rules, and substantial justice will be done by treating the timely filing (as in this case) of the notice of appeal as the sole jurisdictional requirement.

II.

A. People of Puerto Rico vs. Eastern Sugar Associates, 156 F. (2d) 316 (and the similar and more recent case of Berman vs. Parker, 348 U.S. 26) utterly fail to support Appellee's contention. Those cases deal with land properly condemned for a public purpose, to-wit, the eradication of slums, not with the right to condemn agrarian land for an improper non-public purpose, to-wit, the benefit of large industrial corporations.

The question raised by this appeal is not, as Appellee's motion conceives, whether property constituting a vicious social evil in and of itself may be condemned in abatement of that evil and subsquently leased or sold to private interests. On the contrary, the question in this case is whether agrarian lands, the present use of which is concededly benign and for the public interest, may be condemned for the purpose of being leased to other private interests.

In *People of Puerto Rico* v. *Eastern Sugar Associates*, 156 F. (2d) 316, cited by Appellee, and in the similar and more recent case of *Berman* v. *Parker*, 348 U.S. 26, not cited by Appellee, the holdings condemned consisted almost entirely of property that incubated disease, bred delinquency and constituted a cancer at the heart of the social community of which they formed a part. The object of the condemnation was to eradicate squalor and misery noxious to the general public, as well as to the inhabitants of the particular lands condemned. Such condemnation is very clearly proper. Indeed, such is the police power of any state that the owner of a nuisance—and property unfit for human habitation is certainly a nuisance—may be compelled to tear down the buildings and otherwise abate the nuisance at his own expense and, far from receiving compensation therefor, may be fined or imprisoned for not having abated the nuisance more promptly.

Vastly different is the situation in the case at bar.

Appellee does not even suggest, much less does it contend, that the agrarian use of the ranch lands involved in this case is otherwise than wholly in the public interest. It is no answer in the case at bar to contend, as Appellee's motion does, that land which has been properly condemned may thereafter be leased or sold to private interests. The question in the case at bar is whether land may be condemned for the specific purpose of leasing to private interests without any question of eradication of vicious economic and social evils to support such condemnation. As the opinion of the Texas Court of Civil Appeals clearly shows (Jurisdictional Statement, Appendix A, p. 32-3), the ultimate beneficiaries of the condemnation in the case at bar will be large private corporations of the type listed in

that opinion, to-wit: "Carthage Hydrocal; Gulf Atlantic Warehouse Company; Rio Grande Compress Company; Port Fuel Company; Texas Petroleum Trading Co.; Pemex Company (the petroleum company owned and controlled by the Mexican government) and numerous others."

In a word, the beneficiary of the condemnation in the *Puerto Rico* and *Berman* cases was the public; the ultimate beneficiaries of the condemnation in the case at bar will be large private corporations of the type listed above.

B. The notion that courts cannot in a condemnation case go behind the fiat proclamation of an administrative agency that a purpose is public negates the concept of due process of law. This would be true even if the intended use were disclosed, which it is not in this case.

Appellee makes the astonishing statement on page 2 of its motion to dismiss as follows:

> "In such resolution, the Appellee's governing body officially declared the necessity for this exercise of its right and power of eminent domain. The necessity or expediency of the exercise of this right and power, by the public agency to which it has been lawfully delegated, is *conclusive* upon the Courts, since such a question is essentially political in its nature and not judicial." (Italics supplied.)

Appellee thus asserts the amazing thesis that a *fiat* proclamation by an administrative agency as to the alleged "public" purpose for which the land is sought to be condemned "is *conclusive* upon the Courts" and is immune to judicial scrutiny.

This contention is most forcefully refuted by clearly stating it. If, as Appellee contends, the courts of the State of Texas could not and therefore did not scrutinize this purpose, Appellee was thereby denied due process of law;

for it is incumbent upon any court, State or Federal, when Federal constitutional rights are involved, to ascertain judicially whether those rights have been abrogated or impaired.

Courts may appraise the asserted "public" purpose of a condemnation even where the intended use is disclosed. Under the next Part C of this Point we demonstrate that in the instant case, although the purpose is declared to be "public", the actual use intended is not disclosed by the record.

Appellee seeks to reenforce its argument that the courts cannot judicially appraise the public character of the purpose for which condemnation is sought by suggesting at page 10 that it is only where there is an "impossibility" of exploiting the land for the intended purpose that the courts may intervene. This contention merely emphasizes the utter untenability of Appellee's argument that the courts may not judicially ascertain whether the intended use is public or private. They must do so, if the requirements of due process of law are to be met.

C. In the present case, although the "purpose" of the condemnation is proclaimed to be a "public" one, the use of the land actually intended is not disclosed either by the resolution, the statute or the evidence.

The preemption of Appellants' land for undisclosed future uses denies them due process because it deprives Appellants of a judicial determination whether the intended use is in fact public or private.

The following paragraph in the resolution replied upon as authorizing this condemnation is the only indication of the "purpose" for which the land is intended to be taken (Appellee's Motion to Dismiss, Appendix A, p. 24):

> "It appearing to said Commissioners that in making the improvements for navigation of inland and coastal

waters and for the preservation and conservation of inland and coastal waters for navigation and for the control of storm and flood waters of rivers, streams and canals in aid of navigation, and for any or all purposes as stated in Section 59, of Article XVI of the Constitution of the State of Texas, necessary and/or incidental to the navigation of inland and coastal waters or in aid thereof, and for any and all purposes incident to and/or necessary for the development and operation of navigable waters and ports developed by the Willacy County Navigation District within its boundaries and for or in aid of the development of industries thereon, it is necessary and/or required that it acquire fee simple title to the surface and an easement on the mineral rights over, on, in and under the following described lands: . . ."

No one can determine from this language what, if any, portion of the lands is "necessary" for what, if any, industry that may be deemed "necessary and/or incidental to the navigation of inland and coastal waters or in aid thereof, and for any and all purposes incident to and/or necessary" for the development of the port.

The evidence is similarly vague. Appellee's own witness testified as follows (Statement of Facts, p. 929, 938):

"A. We anticipated we would need an additional four hundred acres there, with the hope that later on in the development of the port we might, through the spoiling on the spoil area, re-claim some of that for further development.

Q. Further industrial development?

A. Yes, sir.

Q. Did you have in mind any particular industry for any of those areas?

A. No, sir, not any particular. We had several in mind, of course.

Q. That you hoped to have, but didn't have any particular area set aside for any particular industry?

A. That's right.

Q. And I believe you mentioned also that you had in mind you could probably re-claim some areas and lease that to industries, also?

A. Yes, sir, for the future development."

How can it be said that the intended use of THREE SQUARE MILES of property is "necessary" for "a public purpose" when it is overtly confessed that no reasonably definitive plans have even been formulated for that use.

This Court regularly holds unconstitutional administrative action where the factual basis for such does not appear either in the form of evidence or in the form of specific findings of fact. (Cases are cited in the footnote on page 17 of our Jurisdictional Statement.) It would appear from the vagueness of the resolution and the confession in the testimony that the purpose of the Navigation District is to speculate in this land in the hope of making money on it through its use for the benefit of large private industrial corporations of the type already referred to above. There is no presumption that a purpose is "public" arising from the mere fact of proclamation thereof when the intended use is not disclosed. *A fortiori* there is no such presumption when it is confessed that the future use is not even known to those who uttered the proclamation.

III.

The United States Army was not, as Appellee pretends, "utilized" as a "private dredging concern." On the contrary, the United States Government, at Federal expense and therefore necessarily for a federal purpose, dug the port and the connecting channel and disposed of the spoils.

Appellee does not inform this Court that the dredging of the port and connecting channel and disposing of the spoils

was not only accomplished by United States Army perso nel, but by the expenditure of Federal funds appropriate to the United States War Department for that purpos specifically.

The use of Federal funds for this purpose necessaril characterizes it as Federal, not State. Otherwise the us of such funds would be unlawful and unconstitutional.

The very simple fact remains, as we explained in th jurisdictional statement, that this case represents the co demnation by the State of Texas of 1,000 acres of Appe lants' lands for Federal, not State, purposes. It is pur pretense to state, as Appellee does (p. 13), that the Unite States Corps of Army Engineers was the equivalent o "some private dredging concern" acting "by contract to utilize 1,000 acres of Appellants' lands for spoil disposa purposes. The plain truth is that the dredging of the por and the disposal of the spoils was entirely performed b the Federal Government, using funds appropriated by th Federal Congress to the United States War Departmen specifically for this purpose. The cases cited in the juris dictional statement (p. 21-2) hold that the administrativ agencies of the State of Texas cannot condemn privat lands for such purpose.

IV.

Appellee's offer of a remittitur is a confession that th judgment deprives Appellants of their mineral right without just compensation and therefore without du process of law.

The judgment appealed from condemns the entire "fe simple title to the surface" and therefore leaves no mean of access to Appellants' minerals.

Appellee in effect concedes that this judgment sufficiently destroys Appellants' title to their minerals to require a remittitur in the following language (Appellee's Motion to Dismiss, p. 20):

> "If that be the legal effect of the judgment [*i.e.* if the effect is that "the judgment gave Appellee *exclusive rights* to go upon the surface"], Appellee here and now tenders a remission of such rights insofar as the judgment may have deprived Appellants of their right of ingress and egress and use of so much of the the surface as may be necessary in the development of their mineral estate by exploring for, producing, storing, transporting and marketing their minerals. This remittitur may be effectuated by remand to the trial court with instructions to reform or amend its judgment in accordance therewith and in such language as this Court may deem proper."

Thus even Appellee does not seriously contend that the judgment has not wrested from Appellants all rights of access to their minerals without compensation.

Appellee concedes that, no matter what may be said of this judgment, it is so unclear that it must be amended if Appellants are not to suffer denial of due process of law with regard to their mineral rights.

This concession alone is enough to require that the judgment below be amended in accordance with the remittitur tendered by Appellee. For this reason alone the judgment must be vacated and reversed.

CONCLUSION.

This case tenders constitutional questions of the greatest moment. This Court should note probable jurisdiction and entertain those important questions.

Respectfully submitted,

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